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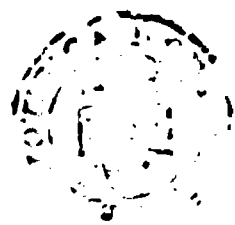
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SEYMOUR D. THOMPSON,
EDITOR.

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I. CONTROVERSIES OF MODERN CONTINENTAL JURISTS.

Preliminary.—Various Theories of the Basis of General Jurisprudence.—Roman Institutes.—System of Utility of Hobbes.—System of Utility of Bentham.—System of Sociability.—System of Perfectibility of Leibnitz.—System of the Possibility of Co-existence of Kant.—Eclectic System of Krause.—System of Rosmini.

Before noticing some of the more modern controversies on the subject of general jurisprudence, it seems to be proper to refer to a few of the most celebrated theories which have been brought forward at different times as to the fundamental principles of the derivation of rights, the primary fabric of law. The subject itself is very obscure, and the manner in which it has been treated by the ablest minds has not served greatly to elucidate it. The more it is considered, the greater the difference of opinion seems to be. The learning on the question fills many volumes; and yet perhaps they hardly contain anywhere a general principle that would command universal assent.

It is needless to say that the question is at the bottom of ethics as well as of law. It has therefore supplied an open field in which writers on morals and writers on jurisprudence have met in indiscriminate conflict. The question is none other than this, expressed in a variety of ways: What are the rights of men? Whence do they come? Upon what basis do they stand? What is the criterion of their existence?

It is a known fact that there are certain principles which pervade all systems of laws, and which are common to all. There is no system of laws that does not forbid murder, or theft. Though the laws of different countries differ, yet they differ rather as to means than as to ends. There are many things which all laws abhor, many things which all laws favor. This substratum of laws which is presumed to exist, and practically does exist, wherever society exists—that which the legislator takes as a starting point—was called by the Roman jurists *jus omnium gentium*, the law of all peoples, or the *jus naturale*, the natural law. This being a constituent element of every conceivable or known system of laws, it is hence assumed that law is not an arbitrary thing; but that it is something either innate in man, or imposed on him by necessities which he cannot escape, and which, to some extent, prescribe its qualities. If this were so, it were to be supposed that the innate quality might be defined in the abstract, or that the nature of the necessities might be explained and summed up in a few words. If the vast bulk of the laws could thus be reduced to one or a few simple theorems, doubtless the gain would be great.

The Roman Institutes possibly essayed to do this. They proclaimed, *Juris præcepta sunt hæc: honeste vivere; alterum non lædere; suum cuique tribuere.*" But it is obvious that this tells us but little. The *honeste vivere* applies to morals rather than to law. The *alterum non lædere* is better. That we should not wantonly harm another is doubtless a principle at the bottom of all laws. The precept that we should give to each his due, leaves us in the dark as to what is his due, and as to the principle on which a man may claim any particular thing as his due. The celebrated precepts therefore mean but little, if anything, more than that it is the duty of the citizen to live morally, harmlessly, and in accordance with the laws, seeing that he must ascertain what is due to others by reference to positive law. However prudent these precepts may be as a guide to the private citizen, they do not purport to be of any profit to the legislator, except within very narrow limits; nor to show forth the essential

principle of the law itself, which defines the mutual and reciprocal rights and duties of men, and the absolute duties of men.

What is called the *System of Utility* is supported by the great names of Hobbes, Bentham and Austin. But the system of Hobbes was different from that of Bentham, (based on the suggestions of Hume and Helvetius,) which was adopted by Austin. What Hobbes meant by utility was the utility of the individual; what they meant by utility was the utility of the individual and the public. The system of individual utility consists in this, that every man has a right to everything that is useful for the satisfaction of his wants or his pleasures. The limitation of his right is the physical impossibility which may exist as to his acquisition of objects which he thus finds to be useful; and this physical impossibility will result either from the weakness and incompetency of his own nature, or the resistance occasioned by the fact that others are pursuing the same objects, and are better equipped for their attainment. From these premises Hobbes drew his celebrated and necessary paradox that the natural state of man is war, war by every man against every other man. It has been said that he simply consecrated the right of the strongest; but that is not true in the sense that it would generally be understood; for by a very metaphysical train of thought, difficult to follow and difficult to refute, he worked out government and a system of regular laws from the resistance which all men in a given society oppose to the acquisitions of any one particular individual.

There is a certain resemblance between his system and that of Kant, which we shall notice hereafter; but there is this intrinsic difference, that the former speaks as if under conviction that it is mere physical force that keeps every man from getting everything that he finds useful for his wants or for his pleasures, while the latter admits the restraining force of moral sentiments. It was from his thus ignoring the moral sentiments that a moral taint was supposed to inhere in the writings of Hobbes, which has conferred on him the distinction of being perhaps the best abused man that ever

lived, unless it were Spinoza, and he and Spinoza incurred public odium in the self-same way. They both attempted to treat metaphysical questions with geometrical precision. Therefore it was that Hobbes discarded the moral sentiments as not being subject to any rigid and definite rule, not meaning to deny their existence. These writers were contemporaries, and their conceit was one of the conceits of the time. Hobbes has had many admirers, but probably not many disciples.

The ablest and most zealous advocate of the theory of utility as understood by Bentham, that has arisen since Bentham died, is John Austin, whose works are so well known that it is not necessary to dwell on them here. The theory is that both law and morals rest on the basis of utility, general utility, including what is most useful to the individual, to others whose happiness depends on his acts, to the community, and to the world at large. The greatest good to the greatest number is the maxim which should govern all men, and which should guide all legislation. It is only by discovering what is useful in this larger sense, that we ascertain what is right. No one appears to have been more thoroughly convinced of the infallible truth of this doctrine than Mr. Austin; no one has supported it by more powerful argument. He left indeed but little to be said on that side. And yet in one place, in speaking of this conception, he said, "There are also considerable difficulties with which it really is embarrassed." The difficulties are certainly great. It denies the existence of a moral sense, except in so far as it may have been generated by considerations of utility. The sense of justice, which, when subjectively considered, is called conscience, is therefore not in any manner inherent in our natures. There is a theory, which is sometimes contended for, that every man is provided at his birth with a conscience, which is capable of guiding him continually in the path of rectitude; whose compunctious visitings unerringly reproach him for every violation of duty. But this is matter rather of dogmatic assertion than of argument or proof. The more intelligent friends of the doctrine of a moral sense choose

less lofty but more tenable ground. They insist that men are born with a sense of justice, just as they are born with a sense of the beautiful. Particular individuals may be wanting in either of these faculties; either may be obscured by ignorance or design; but that they exist to some extent with the vast majority of mankind, of whatever creed, race, or degree of civilization, is proved by all the facts of history.

It must be conceded that the system of utility is opposed to common ideas of duty. Duty is usually considered as something absolute, unchangeable, superior to man and to all human vicissitudes. On the other hand, utility is considered as something which varies according to time and place. It would often, if not generally, be impossible to prove that a particular act will on the whole be useful. It may be useful as far as we can see, be useful perhaps to the present generation, and injurious to the generations to come. The problem as to whether a given act will be useful on the whole, whether its advantages or disadvantages will on the whole preponderate, must not unfrequently be extremely complex. Men usually perform their duties without any such exhausting calculations of chances. They even conceive that the most sublime virtue is that which disdains all considerations of utility. Themistocles told the Athenian people that he had formed a plan which would be of the greatest advantage to Athens, but that it could not be carried out if made public. They directed him to communicate it to Aristides, who was requested to give them his opinion on the scheme. Having heard the proposal, Aristides returned to the assembly, and acquainted the Athenians "that nothing could be more advantageous than the project of Themistocles, nor anything more unjust," upon which the Athenians would hear no more of the matter.

What embarrasses the question is, that by extending the principle of utility to the whole community and to the whole race, it is made to cover the ground occupied by philanthropy, humanity and all the virtues. It may in this manner be proved that morality is useful. Utility and morals, when considered in their most extensive sense, certainly coincide. This is one

of the harmonies of the moral world. But this does not prove that morals are nothing but rules of utility. They may be and are useful, and they may be nevertheless based in certain sentiments and tendencies of humanity which exist independently of considerations of utility. Architecture is useful, and yet it subserves other ends besides. It is possibly a case of the old sophism: *Cum hoc, ergo propter hoc*. The doctrine of Bentham, like that of fatalism, is capable of gaining a strong dominion over the mind, but it is received reluctantly, and is retained with difficulty, in the heart. Tried by a purely logical or intellectual standard, the question is beset with the greatest perplexity; and no one can dismiss it in a summary way, except in the case that he has thought but little about it. Probably most persons who read Bentham or Austin carefully will give to their system their assent; and the probability is that most of the same persons will in a short time insensibly relapse into their old pagan unbelief, and will do right, if they do right, with little or no regard to the doctrine of utility.

The System of Sociability as it has been called was regarded as the strictly orthodox system down to the last century, and commanded the suffrages of such men as Grotius, Puffendorf and Burlamaqui, all claiming to discover its origin in the treatise of Cicero, "De Legibus." It is based on the assumption that society is a universal fact in the history of humanity. It is a necessary fact. It is not pertinent to enquire how or why it exists; the truth is primary, and must be taken as a starting point in all questions concerning law. It is therefore from the conditions of each society as expressed in positive law or in customs that we are to deduce the rights of every member of the given community. We understand this to be stated as a practical test; for the writers on this subject have a great deal to say about morals, certain general principles of equity, or the divine will, to which the positive law ought, in all cases, to conform; but they do not attempt to define in any very precise manner what these principles are. It has been, indeed, objected that the advocates of this theory assert that all human rights flow

from a state of society, and that, in the absence of society an individual has no rights properly speaking; but this is clearly a misapprehension. The authors referred to do, indeed, lay great stress on the social state as limiting and fixing rights, as a criterion of their existence; but they admit that, back of all positive laws, there exists the Divine will, by which the laws themselves are to be tried. Thus Cicero, in the work above cited, says:

“Let us then once more examine, before we come to the consideration of particular laws, what is the power and nature of law in general; but when we come to refer everything to it, we occasionally make mistakes from the employment of incorrect language, and show ourselves ignorant of the force of those terms which we ought to employ in the definition of law. This, then, as it appears to me, has been the decision of the wisest philosophers—that law was neither a thing contrived by the genius of man, nor established by any decree of the people, but a certain external principle, which governs the entire universe, wisely commanding what is right and prohibiting what is wrong. Therefore they called that aboriginal and supreme law the mind of God, enjoining or forbidding each separate thing in accordance with reason. On which account it is that this law, which the gods have bestowed on the human race, is so justly applauded. For it is the reason and mind of a wise Being, equally able to urge us to good and to deter us from evil. From our childhood we have learned to call such phrases as this: ‘That a man appeals to justice and goes to law,’ and many similar expressions, law; but, nevertheless, we should understand that these, and other similar commandments and prohibitions, have sufficient power to lead us on to virtuous actions and to call us away from vicious ones. Which power is not only far more ancient than any existence of states and peoples, but is coeval with God himself, who beholds and governs both heaven and earth. For it is impossible that the Divine mind can exist in a state devoid of reason; and Divine reason must necessarily be possessed of a power to determine what is virtuous and what is vicious. For because it was nowhere

written that one man should maintain the pass of a bridge against the enemy's whole army, and that he should order the bridge behind him to be cut down, are we therefore to imagine that the valiant Cocles did not perform this great exploit agreeably to the laws of nature and the dictates of true bravery? Again, though in the reign of Tarquin there was no written law concerning adultery, it does not follow therefore that Sextus Tarquinius did not offend against the eternal law when he committed a rape on Lucretia, daughter of Tricipitinus. For even then he had the light of reason, deduced from the nature of things, that incites to good actions, and dissuades from evil ones; and which does not begin for the first time to be a law when it is drawn up in writing, but from the first moment that it exists, and this evidence of moral obligation is coeternal with that of the Divine mind. Therefore the true and supreme law, whose commands and prohibitions are equally authoritative, is the right reason of the Sovereign Jupiter."

The System of Perfectibility of Leibnitz, may be expressed briefly. According to this theory man is placed in this world in order that he may labor in perfecting himself, through the development of all his faculties, according to their normal destiny. This labor is the essential principle of all his duties. Seeing that each individual should thus labor in perfecting himself, it follows that he has a right to whatever will aid him in the performance of this allotted duty, and he has a right to nothing more. This comes very near the doctrine of Hobbes, since it leaves it to be inferred that the only limitation on this right is the limitation imposed by physical circumstances, or by mankind at large; but it differs from the theory of Hobbes in this respect, that it establishes the right on a moral basis of action. It is evidently very defective, because it takes no notice of the infinity of indifferent acts, wherein one may do as he chooses, without any appreciable effect either on himself or on others. It is also clear that one may have a right to a thing, although he may fail to use it in perfecting himself according to any moral standard. From this theory there has grown another

in France, which claims the merit of originality, but scarcely deserves to have its claim allowed. Stripped of a vast amount of metaphysical reasoning, this French extension of the doctrine of Leibnitz seems to consist of a complete identification of rights and duties. A man has a right to accomplish his duty, and he has no other right. If he has a right to his good name, or to a chattel, it is only because, under the circumstances, he has a duty to perform in regard to it. The study of law is, therefore, confined to the study of duties; the word right is useless in the science; we should only distinguish duties as active and passive; the authors meaning thereby, acts and forbearances. One of these writers meets the objection that some acts are indifferent, both in a moral and utilitarian point of view, by asserting boldly that no action is indifferent, since every act, however trivial, must produce effects good or evil for some part of humanity. Thereby, however, he begs the question; for admitting what he says to be true, yet an act may still be morally indifferent, seeing that the actor cannot possibly perceive in the performance of an apparently indifferent act either good or evil. His action, therefore, will involve no violation of duty, although it may turn out, eventually, but probably never to his knowledge, that the action may, to some extent, have an injurious result to others or to himself.¹

The System of the Possibility of Co-existence of Kant is distinguished by the originality of genius of that celebrated thinker. In its essence it is brief and comprehensive. He placed the principle of right in personal liberty, each individual extending his activity around him, and thus conquering new forces, which he employs to attain the objects which he proposes in life. The limitation of this principle he placed in the possibility of the co-existence of a like liberty in others: if a man has a right to the free development of his activity, he knows that other men possess similar rights, and he should therefore greatly restrain the extension of his own activity, in order to render possible the co-existence of other men. All

¹ The works alluded to are *Principes du Droit, par Thiercelin, Paris 1862*, and *Conscience et Science du Devoir, par Oudot, Paris, 1856*.

law is therefore founded on the notion of the inviolability of the person. For the rest, he says that rights should be so regulated as to impose the least sacrifice, and that with the greatest equality.² As we shall hereafter have occasion to show the expansion of this theory in a treatise of Prof. von Ihering, published at Vienna during the year which has just closed, we forbear at present to say more of this theory.

Whether what has been called the *Eclectic System* should be regarded as anything worthy of separate classification, has been a subject of dispute. Its author, Krause,³ and his disciples,⁴ claim that the theory is entirely original. Their adversaries assert that it is made up of several systems, which have been ingeniously blended into one.⁵ It may be admitted that in the details there is no want of originality, but it is probable that the theory, in its ultimate essence, which is somewhat difficult to grasp, is not anything more than a fusion of the several systems which we have already mentioned.

The last of these theories that we shall name is that of Rosmini,⁶ which seems to be a special adaptation of that of Kant; and as it consists in the extension of Kant's theory into details, and is perhaps less known in this country than those above referred to, it may not be improper to dwell on it a little. In doing so we shall endeavor to sum up this profound study of Kant in as few words and as clearly as possible.

Accepting Rosmini, then, as a guide, we learn that the foundation of right and law is the inviolability of the human person. A person is the individual man considered as the subject of rights and duties. This person is not the same as the intellectual part of man: it is the most exalted part of the soul; that which directs or controls the inferior passions,

² *Metaphysik der Sitten, Leipsic ed., 1837.*

³ *Grundlage des Naturrechts, oder philosophischer Grundriss des Ideals des Rechts, Berlin, 1803.*

⁴ *Ahrens, Cours de Droit Naturel, 6 ed., Paris, 1849.*

⁵ *Cours Elémentaire de Droit Naturel, par Alphonse Boistel, Paris, 1870.*

⁶ *Della Natura del Diritto, et della sua relazione col Dovere: Del principio della derivazione dei Diritti, Naples, 1837.*

faculties and sensibilities of the mind, or which is capable of doing so; that power which dominates them, and is able to govern them in the light of the moral law; for there are fundamental moral laws, which are as immutable as physical laws; which have existed from all eternity, and will exist forever; and man is able to find them out by proper study, and in the same manner in which he finds out physical laws. In discovering these moral laws, and in conforming his conduct to them, he subserves the principle of utility, just as he does in discovering the laws which pervade the material universe, and avoiding any conflict with them.

It is a part of the inviolability of the person that it should exercise the intellectual forces which have been given to it, or rather which constitute it, subject only to a natural limitation; it may and should cultivate and develop them so as to give them their highest degree of energy; it should do the same by the forces of the body; it may and should, through the agency of the body, extend its power over external objects; should tame their forces, appropriate them, and subject them to the satisfaction of its wants, whether material or immaterial, and to the intellectual and moral advancement of humanity. To touch wilfully and rudely the garment that one wears, is in the eye of the law an assault and battery. This is because the garment is considered as the mere extension of the person, as the body of the wearer is only an extension of the person, which is wholly immaterial. Thus every external object which the individual acquires, or over which he obtains dominion, is an extension of his person. If unmaimed hands give to him a force which he otherwise would not have, or a means of making his inherent forces more available, the same is true of every external object of value which he subjects to his dominion. It satisfies some want; it increases his liberty; for wealth will enable him to travel whithersoever he will; it confers on him a larger social power; he is in so far a different man from what he was before; the force which he is has extended its sphere of action, and he is better equipped for new conquests.

But this progressive expansion of the domain of the person

has a natural limit. The individual man may dispose of everything around him; but he has no right to dispose of other human persons. As soon as he comes in contact with them, or with external objects which they have acquired, and which are to be considered as a part of their persons, he must pause in his conquests; and it is at this point that we perceive the birth of Right. He should concede to others that respect which he claims for himself; and if all persons would do this, each would move unharmed within the circumference of the accessories of his person, whether that circumference was large or small, without conflict; there would be a perfect harmony, which would be the perfect rule of Right. This would be the establishment of the grand principle of the inviolability of the person. It is this which ethics approve and the law seeks. It is the duty of every man, then, to apply all the means in his power to the perfecting of himself and others, and by the side of this duty is to be placed the right which he has, not to be hindered by others in the use of these means. If he is thus hindered, he resists with all the energy in his power, and he has the right to do so, for it is of the nature of all force to react against external action. If, then, he is authorized to resist in this manner, it follows that it is his duty to abstain from all similar aggressions. This is called a judicial duty, and forms the principle of the law, which may be summed up in the precept, "Do no undeserved injury to another." The word undeserved is necessary in this formula, because men cannot be shielded from the evil consequences of their culpable acts.

This scheme leaves a very large place for individual liberty. It gives no one a right to dictate to another that he shall perform abstract duties, such as acts of charity, gratitude or benevolence. Good morals require these, but the law does not. These are embraced in the sphere of the personality of the individual which is his inviolable castle, where the law dare not enter; the province of the law being only to govern the personalities of various individuals so as to avoid any conflict between them. Mere moral duties which create no rights are contradistinguished from juridical duties which

give rise to juridical rights, which the law either sanctions, or may and ought properly to sanction. Rights and duties are the same thing juridically speaking, the former being the active expression, and the latter the passive expression for the same. Every juridical duty has its corresponding juridical right; that is to say the juridical duty of A to B is the right of B as against A.

The necessary conditions of a right are: 1. That there should be a personal activity. When this exists it communicates its inviolability to every power or means of power which it may appropriate for the satisfaction of its desires or wants. There is no right which resides not in an intelligent and free person. The imaginary rights of Ulpian and Justinian residing in the lower animals are therefore denied. 2. A right is an activity which is protected by the moral law, established in the maxim, "Thou shalt not perpetrate an undeserved injury upon any human being;" it is this in which a juridical duty consists, and this is of the essence of every right. 3. This activity in its exercise must be permitted by the moral law. This, however, seems to refer more to the manner in which a right may be rendered available, than to any quality of the right itself. 4. The development of the activity must be useful to the person. Therefore, as embracing all these elements, a right is defined to be "a personal activity, which is useful, and permitted, being under the protection of the moral law, which commands others to respect it, and justifies the use of force in constraining them to do so."

This protection is supposed to exist whenever the personal activity, or any object which it has acquired in a manner allowable by the moral law,—the object being merely an extension of the personal activity, and not distinguishable from it in principle,—so that the object has been appropriated to such an extent that the owner could not be deprived of it without pain, either mental or physical. It is only on account of this pain that he is protected in his property; and thus the inviolability of the person extends to property thus acquired, through which the person may be sensibly wounded

or incommoded. There is therefore a bond existing between the person and every object thus acquired ; and this bond only really exists, and is only entitled to respect when the person has obtained an effective power over the object, when this power is useful to the person, and when its exercise is allowable by the moral law. This bond is made up of three constituents, each of which is indispensable to the solution in any given case of the question as to whether a right which is claimed really exists, and which afford an infallible test. These are as follows :

1. *The Physical Bond.*—The object must be really at the disposal of the person, so that it may be effectually employed for the satisfaction of the wants of the person. Mere desire for an object, or the hope of attaining it, however well founded, will not suffice. If one wantonly and wickedly opposes the acquisition which another seeks to make, he may thereby attack the liberty of such other person ; but the violated right is not that of property in the object, which does not yet exist ; but is the pre-existing right of the free exercise of the faculties through which the object is sought to be acquired. Thus if one hunter is in pursuit of a wild animal which he has wounded, and a second hunter comes up and kills it, the second hunter is entitled to the game, though he might morally and legally be held liable for damages for a selfish and improper interference with the pursuit of another. If one cannot have property in the air, the sea, or flowing rivers, it is because he has not the capacity of subjecting them to his control. The physical bond is therefore wanting. So it is with ideas not reduced to any particular form of words, or clothed with other external forms. The same ideas are open to all men, and may be used by all successively or in common. But when a visible or tangible form is given to them, the physical bond at once exists. The first question then to be solved in ascertaining whether a right exists is as to whether the person has obtained a physical dominion over the subject of the right which he claims. This is a question purely of fact ; and the right must in every case be exactly measured by the extent of this dominion.

It is not true that in a state of nature all men own all things ; in truth in such a state no man owns anything, nor can he own anything until he has obtained such control over it as to make it subject to his wishes ; that is to say, subservient to his person.

2. *The Intellectual Bond.*—It is not sufficient that the physical control over the object should exist : we must also have the volition to apply it to the satisfaction of our wants or desires, either temporarily or permanently ; for where this is not the case, it is clear that we might be deprived of it without pain, in which event there would be no room for the application of the general principle that one should not do an undeserved injury to another. The object must be useful to us, capable of averting suffering, or procuring pleasure. Hence the traders in Africa, who buy gold dust or ivory with a few worthless glass beads, cannot be said to commit an act of injustice, seeing that the objects thus purchased are not useful to those who sell them. Suppose that A buys of B a piece of land, knowing that it contains a valuable mine of which B is ignorant, and without any artifice to defraud B or to prevent him from ascertaining the existence of the mine, for its value as it would be without the mine. In this case the sale shall stand good, because although B occupied the land, yet he knew not of the mine, and thus the intellectual bond was wanting. Certainly there might be something selfish and contrary to good morals in this ; but the author is not speaking of morals, but of juridical rights.

3. *The Moral Bond.*—The development of our activity can only be entitled to the respect of others in so far as it conforms to the moral law. If we claim what belongs to another, what we call our right does not exist. We can therefore only acquire rights over objects which belong to no one, either because they have no owner, or because the owner has renounced his rights in our favor, as by gift, conveyance or contract.

These three bonds or ligaments, connecting the person with the subject of a right, constitute the title to that right. When the first and second exist in the same person, without

the third, they are known in the law as occupancy or possession; which, after a sufficient lapse of time, will draw to them the third, by receiving the sanction of the moral law, as they everywhere receive at some period or other the sanction of the positive law.

It is a part of this system that the idea of property should be extended greatly beyond its ordinary limits, and should be even spiritualized. We have seen that the person is assumed to be the most elevated and controlling element of the intellect of man, and that which especially takes note of morals and of moral responsibility. Beneath this all inferior intellectual attributes are but faculties, possessions, property. The person is essentially free, and is incapable of being bound; but the inferior faculties, the eloquence of the orator, the skill of the artisan, the talent of the artist, may be contracted for and bargained and sold like merchandise. The body is also property, and it may be hired out to labor, just as a horse is hired out. It is the dominating influence of the innermost soul which disposes of all these; and hence as regards others we are responsible for the abuse of any of these powers or faculties to their injury, just as we would be for a use of an external object to their detriment.

Let us see the arguments which the author draws from hence. Things belonging to no one become the property of the first taker or occupant. Thus the fisherman becomes the owner of the fish which he has taken from the sea, or of the amber which he finds, and which has been thrown up by its waves. On the same theory, Rosmini proceeds to show how one human being may become the subject of rights residing in another. Take the new-born child. Its adoptive father, its guardian, or its real parents, find the inferior faculties, sensibilities, passions, emotions and physical body of the infant wholly unoccupied. In any event, the intellectual bond is wanting. The person of the child has not yet secured over this *universum* of property any effective control, and therefore it falls provisionally to the first taker; but only provisionally, for as the child grows in knowledge and capacity, his person first subjects one faculty or instrumentality to

its power, and then another, until at last they are all within his control. This period will be delayed in some instances longer than in others; but the law, for the sake of uniformity, fixes a period of majority for all. But in case the child prove to be permanently idiotic or insane, it never in the whole course of its life acquires that elementary species of property which consists in the free disposition of its mental and physical faculties. And just here occurs one of the weak points in the theory of Rosmini—for there are more than one, and in this brief sketch we are compelled to leave out much both of the good and bad—which is this: If the supposed property in the qualities or faculties of the new-born child belong to the first taker, how is it that a father, who may be far away at the time of its birth, can have any superiority of right over others? In case of the death of the mother in child-birth, and during the absence of the father, the nurse would have rights superior to his. Rosmini felt this difficulty, and met it by supposing that when parents bring a child into the world, they intend that it shall be subject to their will during the time of its immaturity, and thus that it comes into the world burdened, so to speak, with the servitude of filial duty. If it were a question of intent, evidently the intention in different cases might be different, both as to the extent and duration of the filial duty; and some rule would still have to be provided for cases where no particular intention was shown to have existed. But the whole conception is obviously a clumsy fiction; and however useful fictions in the law may be found at times, they are clearly of no value when we come to enquire into the origin of the law, and the abstract reasons on which it is based. On this point, then, the utilitarians come out ahead; but they have their weak side also, and are fain to patch up their system in certain places with equally pitiable expedients.

With the explanations which have already been given, the theory of Rosmini may perhaps be condensed with tolerable accuracy as follows: The sum of the property of a person may be regarded as a sphere, of which that person is the centre. Within this sphere, the action of the person is free

and independent, and is protected by the moral law against all aggression or restrictions. The person has the moral right to oppose force against any attempt to intrude into this sphere, or to usurp any part of it. The spheres of different personalities exclude each other reciprocally, and serve as mutual limitations to each other. For whatever remains outside of these spheres, each person preserves a complete liberty of action, and no one has a right to arrest its action and expansion within this free and unoccupied space; and in this free space there is a large room for rivalry and competition. Every one has the right of pursuit, but no one can have a right to any object until he has apprehended it, and has annexed it as it were to his person, in the manner already stated. A transfer or conveyance of property is an abandonment of it in favor of another determinate person, or a number of such. If the person to whom the transfer is made neglects or refuses to accept the property, it does not fall to the first occupant, as it would do if the abandonment were general; because the owner, having a right of complete disposal of it, may dispose of it conditionally, if he sees fit; and in such case, on a failure of the condition of acceptance, on which the right should be transmitted to another, the property will revert to him who had conditionally abandoned it. A contract which produces an obligation is only an abandonment in favor of another of a portion of one's personal activities. A man may barter his personal services, his skill, his future ability to control and dispose of a sum of money, and the manner of its disposal, just as he may sell and deliver, that is, abandon to another, a chattel, the only difference being that in the former case his obligation is active, while in the latter it is, or may be, merely passive: the duty in the one case relating to acts, and in the other to forbearances.

Rights may also be transmitted by general abandonment. Where property is unconditionally abandoned, it devolves on the first taker or occupant, who apprehends it physically, intending to make it his own, doing thereby no undeserved injury to any human being. Abandonment of whatever kind extinguishes, either conditionally or absolutely, the right of

the owner or proprietor to the subject of the right, by causing the intellectual bond which binds it to him to disappear. Words are merely one class of symbols from which the intentions of men are inferred. In large cities people are to be found who earn a livelihood by collecting articles of small value, which are thrown in the streets. In such cases the abandonment is implied and not expressed. In the same way come titles by prescription or limitation. From long non-user an abandonment of a right is presumed; the intellectual bond is supposed to have been withdrawn; and therefore the right passes to the first taker. In the case of a contract importing an obligation, the abandonment necessarily inures to the benefit of the person on whom the obligation rested, and therefore amounts to a voluntary discharge of the obligation.

It follows from the inviolability of rights, that nothing can destroy them. Prescription does not extinguish the right of the former owner: it merely transfers the right to a new occupant or claimant. Rights may be parcelled out, may undergo many modifications and transformations; but in their essence they are not effaced by time, nor by any act of others. If one kill my horse or burn my house, it is true that I can no longer have the specific property thus destroyed; but my right is not lost; it is only transformed into a right to equivalent damages against the destroyer. What is meant by saying that there is a remedy for every invasion of a right, is that the right survives every catastrophe to which it can be subjected by the acts of others, though it may be in a greatly altered form.

A last will is simply an abandonment of a right in favor of the devisee, conditioned upon the death of the testator, and the acceptance of the devisee. We have seen that the right of a father to the possession and control of his infant child is placed by Rosmini on very slippery ground. In fact, there is a strange weakness pervading his whole theory of the relations of father and child, ancestor and heir. Thus he derives the right of the heir to the succession, not from any presumed intention of the ancestor, but from a kind of men-

tal preoccupation of the inheritance by him in the life of the ancestor, or an established expectation of succeeding the ancestor in his rights of property; notwithstanding that the author elsewhere asserts, and apparently with good reason, that no expectation, prospect or hope of acquiring an object can avail to give any title to it. These and some other defects are, however, compensated by a great deal of profound and original thought.

It is perhaps unnecessary to add that according to this conception of the inviolability of rights, the government can never be authorized to destroy any right of the citizen, however trivial it may be. All that the government can do is to regulate the manner in which individuals shall exercise their rights, so as to be least injurious to others, and hence to promote the general welfare. Every individual has the right to resent and repel by force any intrusion into the sphere of his personal activity; but as it is cheaper, safer and more commodious to have this right exercised for him through the invincible agency of a government, he finds it to his advantage to pay taxes for the support of a government, and to commit to it the defence of his rights in the aggregate, as against both internal and external foes. But the duty and commission of the government consist only in the protection of the various rights thus confided to its keeping. The government may, in a case of emergency, cause the house of a citizen to be destroyed, as during war, or a conflagration, but it is the duty of the government to repay the loss which it thus occasions. This is not in consequence of any supposed need of equality in the imposition of public burdens; but it results from the fact that the government has no authority to destroy any individual right of any citizen. It may, for the common good, destroy his property, but his right will subsist in the form of a just claim against the government.

It may be conceded that under any system of positive law some cases of hardship must occur; that the duty of regulating the manner of the exercise of the rights of men cannot, in the nature of things, be so evenly performed but that in some instances it may be said that a particular citizen, in

some special conjunction of facts, will receive less of benefit than falls to the lot of the rest of the community, yet the principle of co-operation in defence of rights is so essential that it will always be found in such case that the person thus apparently suffering is still far better off than he would be if he were left unaided to ascertain and assert his own rights against all the world; he is at least assured that no right of his shall be destroyed. The government cannot destroy his right, because the fundamental maxim that no one shall do an undeserved injury to another obliges the state, as well as the citizen. When the state takes the property of the citizen for public purposes, it preserves his right by making him an exact compensation; that is, it transforms, or regulates, his right, for the general good; but as the money paid him for the property thus taken is the equivalent in value of what is taken, it cannot be said that his right is either impaired or destroyed.

U. M. ROSE.

LITTLE ROCK, ARK.

II. THE DARTMOUTH COLLEGE CAUSES AND THE SUPREME COURT OF THE UNITED STATES.

There were five of these causes. The first was "trespass on the case" brought by "the Trustees of Dartmouth College" in the common pleas against William H. Woodward, chief justice of that court for converting, etc., the "books and records in writing," "the original charter" and the "common seal of said college." The mandate was to attach the defendant's goods to the value of \$50,000, or to arrest his body. The writ was dated February 8, 1817, and was served on February 10, 1817, by "attaching a chair," "valued at one dollar." The case was entered at the February term, 1817. By consent the cause was entered in the Superior Court—the highest court in the state—at the May term, 1817. This case is reported in 1 N. H. 111–138, and in 4 Wheat. 518–715 (4 Curtis' Decisions, 463–534). The case in both courts is also reported at length in a volume of about 400 pp. by Timothy Farrar, the son of one of the plaintiffs, the partner of Mr. Webster, and one of the counsel in the cause.

The second was the proceeding in the name of the State in which Judge Woodward was acquitted by the same jury that rendered the special verdict in the first case.

The third was a suit in ejectment (for \$3,000), brought in the United States Circuit Court for New Hampshire by Horace Hatch of Norwich, Vermont, for a lot of land near the college. This writ was dated March 9, 1818. A special verdict, about twenty pages in length, was rendered at the October term, 1818, and the case went, upon a certificate of the division of opinion between the judges, to the Supreme Court of the United States.

The fourth was a similar suit of ejectment in the same court (for \$2,000), brought by David Pierce of Woodstock, Vermont, *ex dem.* Job Lyman, on March 27, 1818, against Benjamin Gilbert of Hanover. The trustees of the college

were vouched in at the October term, 1818, and made defendants, and the cause went to the Supreme Court on a similar verdict.

The fifth was a similar suit, *Marsh v. Allen et al.*, brought in the same court with a similar result.

The first two causes were brought in the state court; the others were instituted in the United States circuit court by the special direction of Mr. Webster. His reasons were twofold: The first suit was instituted not by him, but by Mills Olcott, one of the trustees; Webster came into it "at the eleventh hour." The writ of error in this case was brought as a "forlorn hope." It raised but "a single point," whether the legislative acts impaired the obligation of contracts. Upon the whole case—we use that term advisedly—Webster had little faith in that point. Webster was not a learned man, much less a learned lawyer. He was a great man; a sort of half justice has been done to his purely intellectual gifts. A century hence ample justice may be done them. Few gave him credit for tact and management, but no American equalled him in his knowledge of men, and his power to overawe and persuade judges as well as other men. No skilled performer ever handled the keys of his instrument with anything like the consummate skill and art with which Webster, when hard pressed, played upon the prejudices, passions and sympathies, as well as the understanding of men. He turned genealogy into a system of philosophy. He knew Judge Marshall, his court, their prejudices and their antecedents. His conviction was that Marshall would set aside these acts, upon the ground taken by Mason in his argument at Exeter, that they were "not within the general scope of legislative power," if that point could be got before the court.

The first reason Mr. Webster confided to those who were close to his heart, like Choate. Webster, in his letter of December 8, 1817, to Judge Smith, says: "It is our misfortune that our cause goes to Washington on a single point. I wish we had it in such shape as to raise all the other objections, as well as the repugnancy of these acts to the constitution of the United States. I have been thinking whether

it would not be advisable to bring a suit, if we can get such parties as will give jurisdiction, in the circuit court of New Hampshire. I have thought of this the more from hearing of sundry sayings of a great personage [Marshall]. Suppose the corporation of Dartmouth College should lease to some man of Vermont (*e. g.* C. Marsh), one of their New Hampshire farms, and that the lessee should bring ejectment for it. Or suppose the trustees of Dartmouth College should bring ejectment in the circuit court for some of the Wheelock lands. In either of these modes the whole question might get before the court at Washington."

In his letter of April 28, 1818, to Mason, he says: "The question which we must raise in one of these actions is, whether by the general principles of our governments the state legislatures be not restrained from divesting vested rights? this, of course, independent of the constitutional provision respecting contracts. On this question I have great confidence in a decision on the right side. This is the proposition with which you began your argument at Exeter, and which I endeavored to state from your minutes at Washington. The particular provisions in the New Hampshire constitution no doubt strengthen this general proposition in our case; but, on general principles, I am very confident the court at Washington would be with us. If so, then nothing will remain but this: 'Are the powers, privileges, or authorities of the trustees under this charter, rights within the meaning of the proposition? Are they franchises, liberties or privileges, such as the law protects, or are they merely disinterested duties or official services?' I cannot state this question very accurately, but this is the general idea. If we get up one of these cases in due form, we shall defeat our adversaries."

It is to be observed that the last letter was written nearly two months after Mr. Webster had made his celebrated effort at Washington in Judge Woodward's case.

The practical results of that judgment exhibit in a striking light the shortsightedness of men. That decision was invoked by one of the warring factions in the board of trustees

to dethrone another. It made—what the parties to the charter and the “laws of England” never did—a contract which no human external power could ever modify or change.

Judge Marshall decided, in effect, that the Revolution blotted out the legal existence of the “party of the first part”—the fountain from which all its chartered blessings flowed—and put the state of New Hampshire in his place; that prior to the adoption of the constitution of the United States, the charter might lawfully have been so modified or changed; that the most vital attribute of the “contract”—an inviolability as fixed as the laws of the Medes and Persians—inherited, not in the language used by the parties and the recognized law at the time of its creation, but had been injected into it twenty years after it was made by that constitution.

Before and since the Revolution, the legislative bodies in New Hampshire were its “General Court.” That court was accustomed to set aside fraudulent conveyances, order specific performance, revive rules of reference, blot out levies, cancel executions, open, annul, and relieve against judgments, and grant new trials, and in general to give relief where justice had not been done by the ordinary legal tribunals. This was sometimes, though rarely, done upon the ground that there was “no remedy at common law.” These powers were exercised not as a court of chancery, *eo nomine*, but subject to a few theoretical restraints, upon the ground of legislative or parliamentary omnipotence. From 1692 to 1821, New Hampshire had no court of chancery. In 1821, two years after the final decision in this cause, Jeremiah Mason, one of the leading counsel in it, as chairman of the Committee on the Judiciary, reported a bill which became a law, conferring chancery powers in relation to trusts upon the highest court of the state.

Soon after the decision in 1819, some of the trustees who so stoutly resisted all similar attempts on the part of the state, proposed to make material changes in this “inviolable” contract, and these attempts have continued till the present day. The charter created the first board of trustees, made them the corporation, and gave them and their successors the power of

filling all vacancies. It fixed their number "forever" at "twelve and no more." This made the board a species of "council of ten." It is unnecessary to enquire now what would have become of the corporation in the possible but improbable event of the death of a quorum of the trustees or, their neglect or refusal to choose successors. Under the charter the *alumni* have no rights, but for years they have been knocking at the door of the corporation and asking recognition and representation in the board of trustees. As they had given or were expected to contribute liberally to the aid of their *alma mater*, the demand was in itself reasonable. The trustees were inclined to grant it, if it could be done. There was the "rub." The "successors" of those who so stoutly denied all legislative power in the premises in 1816-17, gravely considered the proposition to ask the legislature to amend the charter so that the *alumni* could elect a portion of the trustees; but they had not forgotten that a step somewhat akin to this, proposed by President Brown and Trustee Olcott, who had denied the power in 1816-1819, was under consideration in 1821, nor that Daniel Webster (see his letter to his brother, Ezekiel Webster, of June 17, 1821,) had said: "It would be injurious, I think, to propose to make this important alteration in the charter, before the ground was well explored," etc.

This project was recently abandoned as "too hazardous." The proposition now under consideration by the trustees, is in substance to adopt regulations whereby the *alumni* shall "nominate" a certain number of the trustees, with the understanding that the trustees shall "confirm" that "nomination," by going through the forms of an election. It is understood that a majority of the trustees are in favor of the plan stated. It is difficult to understand how trustees charged, as they claimed, in the most solemn manner, with the execution of great trusts, by the very instrument to which they owed their own existence and their powers, could, of their own motion, lawfully divert or annihilate the one, and change the legal effect of the other. If one step like this can be taken, another may; and this "inviolable" charter would be virtually abolished by the trustees.

But the important question for the American people is not whether the judgment against Judge Woodward could have been sustained upon other grounds, which the Judges of the Supreme Court could not consider without a violation of the constitution, the laws of the United States and their oaths; but whether the principle underlying that decision is definite, tangible and sound, whether it covers the innumerable causes which have found shelter under the wings of the opinions popularly supposed to have been delivered when that decision was given; and, in fact, whether the countless and constantly increasing array of corporations in this great country have more of sovereignty than the power which gave them being. No questions which can be raised involve such far-reaching consequences as these. And their importance increases year by year, in a ratio which has no parallel in the past, and can have none, when we shall have attained a population of from 200,000,000 to 500,000,000.

But the tide of events will force their discussion and compel their determination. They must be brought in review. The truth will be sought till found. It is best that this should be done by judicial decision. The court, as now constituted, may not be able to settle them; if not, their successors must; or, if the republic endures, the people, in the proper way, will. The present judges are of varying, but in general, of eminently respectable attainments. Some of them are very eminent in special departments; but no fact is more painfully apparent to those who have studied closely the course of that great tribunal, than that its decisions lack the unity which marked them during the dictatorship of Marshall and under the great triumvirate of the "old bench," Taney, Nelson and Campbell. For years it has had no commanding spirit on its quarter-deck. It has lost its reckoning; it has been beating about in a storm; it has relapsed into the chaos of doubt and uncertainty which marked the earlier years of its existence, when the politicians—or statesmen—of that day bivouacked in the Chief Justiceship on their march from one political position to another. The territorial extent of the Union when that court was created, as compared with

the present, was but a "patch upon the earth's surface." The population has gone up from four to more than forty millions, and the judicial business has increased out of proportion to both. The country has outgrown the court. Laying out of the case the mass of causes originating in the district or circuit courts, which may go to the Supreme Court for final determination, it is, as to a most important class of questions, the court of last resort for nearly fifty states and territories. That the disparity must increase year by year is inevitable. It was the remark of Judge Curtis, one of the most eminent judges of the Supreme Court, that no lawyer could be of much assistance to a court unless he had grown up in the atmosphere of the statutes and the practice of that jurisdiction. It is simply impossible for the judges to have this knowledge of the local law which they are so often called upon to interpret. The result of all this has been hasty, conflicting and ill-considered decisions, and opinions sometimes slipshod, and wandering in darkness, while filled with learning.

Recruited at an early period in our history, by the political department of the government, to a great extent from political life, and hence to a certain degree fashioned by it, the Supreme Court has betrayed in its acts the defects of its organization. It has suffered from internal dissensions and outside pressure. It has sometimes done the things which it ought not to have done, and much oftener omitted to do those things which it ought to have done.

The power of taxation is generally conceded to be one of the primary attributes of sovereignty. If corrupt legislative bodies can irrevocably auction off this power to the highest bidder by instalments, why not the whole, and at once? If one of these attributes can be constitutionally converted into merchandise under the legislative hammer, why not others? Did the constitution, under the clause "nor impair the obligation of contracts" establish the doctrine of state suicide, or grant the power to destroy the "foundation idea of the government?"

The Dartmouth College causes have a history. With Coke, as briefly as we may, let us begin at their "fountains to trace

the streams." In 1680, the king, sorely against the will of the settlers, who numbered less than 4000, created the province of New Hampshire, for the purpose of enabling the royal favorites to plunder them of the fruits of their lands, which they had reclaimed in spite of the red man's rifle, scalping knife and fagot. For years they suffered severely from these pro-consular robbers and their agents; but, at a later period, under the guidance of able leaders, the province in general had far less occasion to complain of the royal policy than many of her sister colonies, and often received marked favors at the hands of the crown. Massachusetts had long claimed dominion over the heart of the province, by an alleged boundary line, running from the Connecticut river to its eastern boundary, through a point about four miles north of Webster's birth-place. But on April 9, 1740, the king in council decided against Massachusetts, and gave New Hampshire an east and west base line next to that river. Soon after, Benning Wentworth, governor of New Hampshire, assumed that this decision, in effect, carried the western boundary of the province across the Connecticut to the "South Sea," except so far as the same was covered by prior grants from the king. He laid out and granted away 136 towns, containing more than half a million acres of land, west of the Connecticut river, in what is now the state of Vermont, ending with Bennington, named for himself. Dunmore, governor of New York, subsequently granted away 511,900 acres of the same land. This brought on the controversy between New York, New Hampshire, Vermont, and the settlers in the valley, about the "New Hampshire grants," which kept the settlers on both sides of the river in a political ferment for years, and brought the whole to the very verge of civil war.

In 1735 the Rev. Dr. Eleazer Wheelock, of Lebanon, Connecticut, a graduate of Yale, was ordained. He was a man of powerful intellect, great energy and intense religious zeal. He stood in the van of the "great religious awakening of 1740." In his anxiety "to spread the borders of Zion" he *revived*, in 1754, the "Indian Charity School," established at Stockbridge, by Sargent, under the name of "Moors'

Indian Charity School." This school was so called from the name of the principal donor, who gave it a house and two acres of land. It was established for the purpose of educating and christianizing Indians through its Indian missionaries. Wheelock proposed to move this school to some location nearer the red men. In December, 1743, Wheelock took Samson Occom, a Mohegan Indian, into his family, where he remained for five years. Occom proved to be an excellent scholar, of rare ability, and soon became a "preacher of distinction." In 1762 Wheelock sent him to England and Scotland to preach and solicit funds for the school. He aroused great enthusiasm among the clergy and nobility, and his mission was a success. In 1766 the king gave £200 and the Earl of Dartmouth 50 guineas for this school. About £7,000 were collected in England and placed in the hands of a board of London trustees of which the Earl of Dartmouth was the head, and John Thornton, a rich merchant of London, one of the principal managers. Between £2,000 and £3,000 were collected in Scotland and called the Scotch fund, which was deposited with the "Scotch Society for the Propagation of Christian Knowledge," etc. As manager of the school Dr. Wheelock always accounted for his disbursements to these trustees. Occom returned having raised about £12,000 in all. The legislatures of Connecticut, Massachusetts and New Hampshire also granted aid. Wheelock had thus been instrumental in securing large contributions for this purpose in England and Scotland, as well as America.

Plans were set on foot to remove the school to lands on the Mississippi given to the officers of the old French war; to remove it to Albany, New York; to establish it in Springfield, Massachusetts, and to locate it at Hinsdale and Canaan, New Hampshire. Wheelock spent over two years in fixing upon a new location and in preparation for its removal; but after repeated conferences with the governor of New Hampshire and several of its leading men, he removed the "Indian Charity School" to Hanover. For twelve years prior to this time, the clergy of eastern and middle New Hampshire had

in vain sought to obtain a charter for a college. As a consideration to locate the "Indian School" in New Hampshire, on December 13, 1769, the governor readily granted to Wheelock, an inhabitant of another colony, the charter of Dartmouth College. These London trustees, to gratify Wheelock, consented to the change of the location of the charity school to Hanover. The college was established there, chartered and named without their knowledge or consent.

How the college came to be named for Dartmouth may never be known. It did not originate with Wheelock, for his purpose was to name the institution Wentworth School, in honor of Governor Wentworth who, aside from the state, was the greatest benefactor of the college. It did not originate with Dartmouth or the London trustees. They not only knew nothing about it, but were bitterly opposed to the charter and establishment of the college when they found it out. In July, 1770, one of these trustees—referring to Dartmouth and Thornton—wrote to Doctor Wheelock, "they as well as the other trustees, see clearly that by the affair of the charter, the trust here is meant to be annihilated. It was certainly a very wrong step for you to take without consulting us. Dr. Wheelock, in his reply of November 9, 1770, says: "The charter was never designed to convey the least power or control of any funds collected in Europe, nor does it convey any jurisdiction over the school to the trustees of the college. The charter granted them jurisdiction only over the college. If I resign my office as president of the college, I yet retain the same relation to the school and control of it as ever." On April 25, 1771, the Earl of Dartmouth wrote to Dr. Wheelock: "We cannot look upon the charter you have obtained and your intention of building a college for English youth but as going beyond the line by which both you and we are circumscribed."

The trustees of the college voted that they had no control over the school. The funds of the school were kept separate from those of the college, until it expired in 1846.

In 1768 there were but eight lawyers in New Hampshire, and apparently none of them were consulted in relation to the charter. Wheelock drew it up himself with such assist-

ance as he procured outside the province. The governor made but a few changes in it. The charter, as drawn by Wheelock, termed him "the founder of the said [Indian Charity] School," granted a charter for an "academy," and provided that Wheelock was "to be the president of the said academy." The charter actually granted was for a college. The school already existed; the college was prospective. They were to be located in the same town or district, but to be independent. The trustees for the two were not the same.

To the school Wheelock gave liberally, but to the college nothing. The province and state gave nothing to the school, but it gave 42,000 acres of land to the college, in 1789. It afterwards established the medical school and made other considerable donations. Governor Benning Wentworth gave 500 acres of land, in Hanover, to the college, and Governor John Wentworth 400. Many others contributed, but there is not a particle of evidence as to who the first donor was. The school and the college, though to a great extent under the same control, were not merged; and the long preamble to the college charter is merely a history of the charity school and the circumstances which induced Dr. Wheelock to apply for a charter for the college.

But the two institutions were managed essentially by the president and the trustees of the college till 1807, when the school was incorporated by the legislature of New Hampshire, and the trustees of the college were made the trustees of the school, but with a proviso that the funds of the school were to be kept distinct and applied according to the uses designated by the donors. The charter, *in theory*, was granted by George the Third, the same as all writs in the province were issued in his name; but *in fact* it was granted by John Wentworth, governor of the province.

He struck out of the charter the names of some of the trustees inserted in it by Dr. Wheelock, and even that of the Bishop of London, whose name had been agreed upon, and inserted his own name, that of the president of the council, the speaker of the house, and two other prominent men of the province, in their stead. While Wheelock and six other

Connecticut men constituted a majority of the first board of trustees, the clergy of New Hampshire were without a single representative.

The charter declared Dr. Wheelock the founder, made him the first president of the college, and authorized him, by his last will, to appoint his successor. A fundamental provision of the charter was that there should be no discrimination on account of religious faith or principles.

The population of the province at this time was about 60,000, and a majority of them were probably Orthodox of the Plymouth Rock school; but Episcopalians were quite abundant on the sea coast, and many of the prominent men of the province, including the governor who granted the charter, affiliated with that church. The Presbyterian churches were scattered along the valley of the Merrimack. Wheelock had great popularity, and in his later years, at least, was a Presbyterian.

When he established his Indian school and college in the wilderness at Hanover, his religious and personal friends from Connecticut swarmed after him up the valley above Hanover on both sides of the river. Fifty-two people from Connecticut settled Hanover, and eight hundred families from Connecticut gathered below him in a few towns on the New Hampshire side alone. In a word he founded on the extreme western border of New Hampshire, separated from the rest of that state by a vast wilderness, a Connecticut colony which had but a mystical legal connection with it. Parishes were at that time in the province *quasi* corporations, and are recognized by the existing constitution. The better to conserve his power, a district three miles square, called Dresden, was created by statute, to be under the immediate jurisdiction of Dartmouth College, and special jurisdiction over this little empire was given to President Wheelock as its magistrate. Aside from Wheelock, the college faculty were at the bottom of the secession of the sixteen river towns from New Hampshire, and the movement to establish a new confederacy with the college district as its capital. The church, school and college were under the personal government of the president

till his death in 1779, when they descended as an heir-loom to his son John Wheelock, who was called from the army, and became by force of his father's will his dynastic successor. He retained his office until he was removed by the trustees in 1815, after a service of thirty-six years.

He had the benefit of foreign travel; gathered contributions for the college in all countries; was rich, courtly and strong-willed; had given his services and oftentimes his money to the college, and had proposed to give more, and make it in effect his heir.

The quarrel in the board of trustees which resulted in the college causes, began some twelve years before his removal. Political differences had nothing to do with it, nor matters of faith; for the board were nearly all rank Federalists, and differed in form only as to church polity. Dr. Wheelock led one wing, and Dr. Shurtleff appeared to lead the other. Dr. Wheelock claimed that the Presbyterian, and Dr. Shurtleff that the Congregational form of church government should prevail.

The former was a government by the eldership, and the latter by major vote of the body of the church—a pure democracy. Many of those who are best informed believe that the subsequent troubles and the famous litigation arose in fact, as well as in form, from this apparent difference of opinion about church government.

The eight trustees who removed Dr. Wheelock were manifestly of the opposite opinion.

They say: "The trustees now solemnly declare, that they do not feel and never have felt any hostility toward the Presbyterian form of church government, or toward the church of which the president is a member, nor any wish to give the new church any advantage over the old, or in any way to interfere with their unhappy controversy. * * * * They do, however, believe that the seeming attachment of the president to this particular form of church government is mere pretense." We think this difference was only the name of the case,—the John Doe and Richard Roe of the ejectment.

The board of trustees was, and for years had been, a strange

medley in composition but, as a whole, endowed with remarkable intellectual gifts.

Judge Niles, of whom his intimate friend, Jefferson, said, "He is the ablest man I ever knew," was priest, lawyer and metaphysician, and was a man of great and varied powers. Judge Marsh was the father of that eminent scholar and diplomatist, George P. Marsh, long one of our foreign ministers. He was a man of immense ability, and the cousin of Jeremiah Mason. Judge Paine was a man of iron. It is said that his voice could be heard distinct and audible three-fourths of a mile. In physical and mental stature he was a giant. He was in many respects the Drouet of the board. None of these were New Hampshire men. Thomas W. Thompson had been speaker of the house, and was then senator in Congress from New Hampshire. He was a graduate of Harvard, and had been tutor there. He was an eminent lawyer and the leading, managing politician in the Federal party in New Hampshire. He had been the patron and legal instructor of Daniel Webster, and was one of his most intimate friends. Judge Farrar was another. He was a leading Federalist, and the father of the second Judge Farrar who read law with Mr. Webster, was his partner at Portsmouth from 1812 to 1816, and one of the counsel in the case against Judge Woodward.

Mills Olcott, the father-in-law of Rufus Choate, was an eminent lawyer of Hanover. He was the friend and special attorney of Gov. William Smith, the famous Tory chief of New York; was a prominent Federalist, the intimate friend of Webster, and tainted with the odor of the Hartford Convention. The rest were notable men.

Nothing short of divine power could control such men. Dr. Wheelock, walking in the footsteps of his father, was generally supported by a majority of the board till 1809, when death and the influence of Jeremiah Smith, who was then Governor of New Hampshire, gave a majority to his adversaries. After that, no friend of his was elected to the board. For years there was a struggle on the part of Wheelock to retain, and on the part of a minority, afterwards grown to a majority, "to put down" what they termed the "domination" of Wheelock.

Threats that the legislative authority would be invoked were apparently bandied about from 1805, till it came in 1816; and the question was sometimes, as was the proposed removal of Wheelock, openly discussed in the board. Apparently the idea that the charter was a contract, which no legislature could impair or affect, originated with the schoolmen, the professors and doctors of divinity, and not with the legal giants in the board, or those who afterward acted as counsel. The eight trustees, in their reply to Wheelock, virtually charge him with being its author. They say: "During his troubles in the legislature of Vermont [commencing as early as 1806] relating to the grant of the township of Wheelock, the president has been often heard to say (and if the application were from the other side, and designed to correct any of his abuses would now say), that the charter of the college was a *royal* grant, and not under the control of the legislature. His motive in this proceeding can be nothing either more or less than to prejudice the minds of the members of the legislature and of the people, by inducing a belief that the trustees aim at an independence not given them by the charter."

At the meeting of the trustees on August 28, 1816, they say: "This grant having been made by the charter of 1769, and accepted by the trustees named in the instrument, it becomes a contract, and irrevocable on the part of the government in its very nature, so long as its terms are complied with. It may be surrendered or forfeited. If forfeited, a judicial enquiry must be had, according to the constitution and laws of the state. It is not competent for the legislature to decide the question of forfeiture. The constitution forbids it, and refers it to the judicial department of government. Any act of the legislature, altering or impairing the contract, without the consent of the trustees, must, we apprehend, be considered by the judicial tribunal a violation of the 10th section of the first article of the constitution of the United States, which declares, 'No state shall make any law impairing the obligation of contracts.'"

It is quite apparent that the trustees intended to charge Dr. Wheelock with maintaining the doctrine in 1806-1807 which

they successfully set up years later. It is noticeable that neither Dr. Wheelock nor any of his friends denied the charge. Open hostilities broke out in April, 1815, by the publication of a pamphlet of eighty-eight pages, in the interest of Wheelock, entitled, "Sketches of the History of Dartmouth College and Moor's Charity School, with a Particular Account of Some Late Remarkable Proceedings of the Board of Trustees, from the Year 1779 to the Year 1815."

The trustees charged its authorship upon Dr. Wheelock, Col. Josiah Dunham, a noted Federalist politician and state secretary of Vermont, and Rev. Dr. Elijah Parish. This was quickly followed, on the same side, by a like pamphlet of thirty-two pages, by Dr. Parish, entitled, "A Candid Analytical Review of the 'Sketches of the History of Dartmouth College and Moor's Charity School, with a Particular Account of some Late Remarkable Proceedings of the Board of Trustees, from the Year 1779 to the Year 1815.'" The "Sketches" charged the trustees with the misappropriation of the Phillips and other funds, and with withholding from him several thousand dollars which Wheelock had allowed to remain in their hands, subject to his right of future appropriation.

These publications created a great sensation. The newspapers took up the war, and made the most of it. Judge Niles published a series of elaborate articles in reply. In one of them he says, in reference to the facts stated in the "Sketches," "I readily admit that they [the trustees] have done the facts that are charged."

Legal proceedings were threatened and seriously contemplated by Wheelock. He at once took steps to procure counsel. There were obvious reasons why he should not employ Gov. Plumer, Jeremiah Smith, or Jeremiah Mason. The feeble health of Plumer had driven him out of practice; Smith's vote, as *ex-officio* trustee, in 1809, had delivered Wheelock over to his enemies; and Mason was the relative and intimate friend of Judge Marsh, one of the hostile majority. Through a friend he applied to Webster, whose personal sympathies were then, as they always were, with Wheelock, for his "professional" assistance, which was promised. In June following,

Wheelock personally consulted Webster with reference to his troubles with the trustees, retained him, and paid him therefor. This of course was not a formal retainer in the particular litigation which followed. In consequence, Wheelock applied to Webster to assist him in the hearing before the legislative committee. Webster failed to appear. His reasons are set forth at length in his letter of August 25, 1815. Wheelock went on with the hearing with such assistance as he could get. Thompson, in his famous letter to Professor Adams, of July 15, 1815, said, "I have had a long conversation with Mr. D. W., by which it appears, that a strong desire prevails, that the *Reply*, with the *Committee's Report*, should effectually put down a CERTAIN MAN." Everybody knew that D. W. meant Daniel Webster, and that Wheelock was the man to be "put down."

This letter was a bombshell in the Wheelock camp. On account of this, Dunham wrote his fiery letter to his personal and political friend, Webster, giving the Wheelock view of his conduct, to which Webster replied in his letter of August 25, 1815. (1 Webster's Private Correspondence, 251.) Webster says: "It was intimated to me last spring, that the president might possibly institute process against the trustees for the recovery of money due him from them; that proceedings might also be commenced in the courts of law, to determine whether there had been a perversion of the Phillips fund; and that in case these events should happen, the President would be glad to engage my assistance as counsel. At Concord, the president suggested in general terms, that he might wish to obtain my professional assistance on some future occasion, which I readily promised him. After Dr. Haven had left this place for Hanover, I received the president's letter, desiring me to be at Hanover at a time which had then already elapsed. I answered it by mail, not quite so soon as I should have done if I had not expected some private conveyance, and if I had not known that an answer by any conveyance would have been wholly immaterial at that time. If I had received it earlier, I could not have attended, because the court engaged me at home; and I ought to add here, that if I had had no other

engagements at the time, and had also been seasonably notified, I should have exercised my own discretion about undertaking to act a part before the committee at Hanover. I regard that as no professional call. * * * *

"As to what you are pleased to say about my extricating myself from this affair, or of its being otherwise unpleasant to me, as also what you observe of a suspicion entertained by some that Mr. Thompson had employed me to feel of Mr. Haven on the subject, give me leave to say that I should know better how to answer these remarks if I were not writing to one for whom I have the highest and warmest esteem, and of whose sense of delicacy and propriety very few, certainly, at any time, have had occasion to complain. * * *

"I am not quite so fully convinced as you are, that the president is altogether right, and the trustees altogether wrong. * * * * You may be well assured that in our nomination of governor we have regarded nothing but the political interests of the state. I can but flatter myself that if you were better acquainted with the circumstances, you would think less unfavorably of the conduct of your Federal friends."

Governor John Taylor Gilman was a fast friend of Wheelock. The political allusion in Webster's letter, refers to the well-known conviction of Wheelock and his friends that Thompson and other leading Federalists had determined to force Gilman into retirement, and to put Judge Farrar, a hostile trustee, in his place.

That Thompson wrote the truth to Adams admits of no doubt. That Webster did not meet the issue raised by that letter squarely, is too plain for cavil. The key to this course lies in the fact that Webster's most devoted friends and political adherents were hostile to Wheelock. They and political complications and considerations detached him from Wheelock, in the teeth of his sympathies and against his convictions. Great streams flow from little fountains. This explosion ended the "professional" relations between Dr. Wheelock and Mr. Webster, and, in the belief of the writer, added by construction another provision to the Constitution of the

United States, and changed the public law of the Union. At the June session, 1815, the time of his consultation with Webster, Dr. Wheelock followed up his charges with the oft-threatened memorial to the legislature, in which he set forth that the trustees, "had forsaken the original principles, and left the path of their predecessors;" that they had by improper "means and practices," "increased their number to a majority controlling the measures of the board;" "that they have applied property to purposes wholly alien to the intention of the donors;" that they have "transformed the moral and religious order of the institution by depriving many of their innocent enjoyment of rights and privileges for which they had confided their faith; that they have broken down the barriers and violated, by prostrating the rights with which it [the charter] expressly invests, the presidential office."

He then charges misapplication of funds and various breaches of trust, and concludes with the prayer, "that you would please, by a committee invested with competent powers, or otherwise, to look into the affairs and management of the institution, internal and external, already referred to; and, if such is expedient, in your wisdom, make such organic improvements and model reforms in its systems and movements, as, under Divine Providence, will guard against the disorders and apprehended consequences." The house, by a vote of 123 to 50, granted the prayer of Wheelock. Governor Gilman appointed D. A. White, Nathaniel A. Haven and Ephraim P. Bradford, a committee of investigation, who made their report on April 23, 1816, stating the facts found, but making no recommendations. The hearing was had before this committee, commencing August 16, 1815.

Webster failed to appear for Wheelock. His reasons we have already seen. On August 26, 1815, without waiting for the report of this committee, on the motion of Judge Paine, without a hearing, the majority of the trustees removed Wheelock from his office as president and trustee, disapproved of his appointment under his father's will, and two days later put Professor Brown in his place. Gov. Gilman and Judge Jacob, two of the trustees, entered their protest in writing against the removal of Wheelock.

In 1815, Benoni Dewey, James Wheelock and Benjamin J. Gilbert, a committee of the Congregational church at Hanover, replied to the "Sketches" in a pamphlet of 68 pp., entitled, "A True and Concise Narrative of the Origin and Progress of the Church Difficulties in the Vicinity of Dartmouth College in Hanover," etc. In August, 1815, the trustees published in a pamphlet of 104 pp., "A Vindication of the Official Conduct of the Trustees of Dartmouth College," etc. In 1816, Peyton R. Freeman published, in reply, a pamphlet of 32 pp., entitled, "A Refutation of Sundry Aspersions in the 'Vindication' of the Present Trustees of Dartmouth College on the Memory of their Predecessors." In 1816, Col. Josiah Dunham also replied in a pamphlet of 95 pp., entitled, "An Answer to the 'Vindication of the Official Conduct of the Trustees of Dartmouth College' in Confirmation of the 'Sketches,' with Remarks on the Removal of President Wheelock." These documents contained charges and counter-charges, criminations and recriminations, in abundance.

So far this had been a controversy among Calvinists and Federalists. It had originated among those professing the same religious faith—between the Federalist trustees of a Federalist college. A Federalist governor had appointed an investigating committee, under the vote of a Federalist legislature, upon a memorial of the Federalist Wheelock. But other forces were soon to make themselves felt. Ever since the Revolution, and indeed before, the Congregationalists, the "standing order," as it was often termed, had been the dominant religious sect. It had become a species of "state religion." Its ministers were nearly all Federalists, and its laymen largely so. They were exempted from the capitation tax. All other denominations had to support, not only their own church organizations, but through the "contract" system and the tax power, were also compelled to contribute to the support of this denomination as if they were members of it. The constitutions of 1784 and 1792, with the exception of the disgraceful provisions (always a dead letter), which prohibited Catholics from holding a few political offices, put all religious denominations upon the same level. But the dom-

inant order made and enforced such laws as they saw fit. Some of the judges were far from unbiased, while the juries were not likely to agree against a church, of which, in general, a majority of them were members; and so the people were compelled to pay "tithes" to the dominant sect, or to be ruined by litigation.

When the college quarrel opened the breach, the other denominations took courage and massed together to wring the legislation which followed—the college acts, the laws equalizing taxation, and "the religious toleration acts,"—from the "standing order," which they succeeded in doing in less than seven years. The college was located on the border; the district was the birth-place of secession; prior to the Federal Constitution the confederacy had denied and defied the jurisdiction of New Hampshire; the liberals in politics and religion had long regarded the institution as exclusive, aristocratic, and the stronghold of Federalism and the "standing order," and the leading Federalists and their organs had given Wheelock the cold shoulder. The politicians were not slow to see the drift, and took the rising tide.

The Anti-Federalists again put Governor Plumer in the field. He was a strong man and an eminent lawyer. When a mere child he was a Baptist preacher whose powers of reasoning astonished even the veterans of his day. Afterwards he relapsed into the liberalism of Jefferson and took to the law. The constitution of 1792, which, with a single amendment, remains unchanged to this day, was popularly termed "Plumer's Constitution." He had been long in political life, a senator in Congress, and for many years had been one of the pillars in the great Federal triumvirate, Smith, Mason and Plumer, which controlled the state. But the troubles with Great Britain which preceded the war of 1812, carried him over to the side of Jefferson. He lacked the affluent learning of Smith and Mason; he had little of their aptitude with the pen; he was no orator; but his thoroughness of preparation, his great knowledge of men, and his vigor of understanding, enabled him to compete suc-

cessfully with Smith, Mason and Webster. His private life was stainless. He possessed great moral courage and independence, and yet he was the Nestor of the politicians of his day. His sympathies were naturally, as they were openly, with Wheelock. A heated political contest came on. Under the ban in their own party, Wheelock's friends, by the hundred, voted steadily for Plumer. The strong man carried the party on his back and was elected by a handsome majority. Brown, Thompson and Webster saw what was coming and made ready, as best they could, to avert the storm. In his message to the legislature, in June, 1816, Governor Plumer said:

"Permit me, therefore, to invite your consideration to the state and condition of Dartmouth College, the head of our learned institutions. As the state has contributed liberally to the establishment of its funds, and as our constituents have a deep interest in its prosperity, it has a strong claim to our attention. The charter of that college was granted December 13th, 1769, by John Wentworth, who was then governor of New Hampshire, under the authority of the British king. As it emanated from royalty, it contained, as was natural it should, principles congenial to monarchy; among others, it established trustees, made seven a quorum, and authorized a majority of those present to remove any of its members which they might consider unfit or incapable, and the survivors *to perpetuate the board by themselves, electing others to supply vacancies*. This last principle is hostile to the spirit and genius of a free government. Sound policy therefore requires that the mode of election should be changed, and that trustees, in future, should be elected by some other body of men. * * * * *

"The college was founded for the public good, not for the benefit or emolument of its trustees; and the right to amend and improve acts of incorporation of this nature has been exercised by all governments, both monarchical and republican. Sir Thomas Gresham established a fund to support lecturers in Gresham College, in London, upon the express condition that the lecturers should be unmarried men, and,

upon their being married, their interest in the fund should absolutely cease; but the British Parliament, in the year 1768, passed a law removing the college to another place, and explicitly enacted that if the lecturers were married, or should marry, they should receive their fees and stipend out of the fund, any restriction or limitation in the will of the said Gresham to the contrary notwithstanding. In this country a number of the states have passed laws that made material changes in the charters of their colleges. And in this state acts of incorporation of a similar nature have frequently been amended and changed by the legislature.

* * * * In the charter of Dartmouth College it is expressly provided that the president, trustees, professors, tutors and other officers, shall take the oath of allegiance to the British king; but if the laws of the United States, as well as those of New Hampshire, abolished by implication that part of the charter, much more might they have done it directly and by express words. These facts show the authority of the legislature to interfere upon this subject; and I trust you will make such further provisions as will render this important institution more useful to mankind."

Governor Plumer communicated this message to Jefferson, who replied in his letter of July 21, 1816: "It is replete with sound principles, and truly republican. Some articles, too, are worthy of notice. The idea that institutions established for the use of the nation cannot be touched nor modified, even to make them answer their end, because of rights gratuitously supposed in those employed to manage them in trust for the public, may perhaps be a salutary provision against the abuses of a monarch, but it is most absurd against the nation itself. Yet our lawyers and priests generally inculcate this doctrine, and suppose that preceding generations held the earth more freely than we do; had a right to impose laws on us, unalterable by ourselves; and that we, in like manner, can make laws and impose burdens on future generations, which they will have no right to alter; in fine, that the earth belongs to the dead, and not to the living."

The recommendations of the governor became a law; the name of the College was changed to University; the number of the trustees was increased to twenty-one; a board of overseers was created, to be appointed by the governor and council; the president and professors of the university were required to take an oath to support the constitution of the United States, and of the state of New Hampshire; and the act provided that "perfect freedom of religious opinion should be enjoyed by all the students and officers of the university." The committee to whom the message, etc., relating to this subject were referred, did not undertake to decide in favor of either party to the controversy, but alleged that the troubles arose from certain defects in the charter, and that they would recur again in some form, unless those defects were remedied.

The case of Prof. Hale, who was ousted some thirty years after on account of his Episcopalian tendencies, under a charter granted by an Episcopalian governor, would seem to show that this committee had a prophetic eye. The debates upon the historical and constitutional questions involved were able. The minority were ably led, both inside and outside the legislature, but parliamentary tactics availed them nothing. Many of them joined in a written protest against the passage of the bill, the substance of which has already appeared in the action of the trustees. On August 28, 1816, a majority of the old trustees formally refused to accept the provisions of the act.

A meeting of the trustees of the university, under the act of June 27, 1816, was called, but through the illness of a single member, failed for want of a quorum. The judges of the superior court, on December 5, 1816, in answer to the governor and council, gave their opinion that the executive department had no authority to fill the vacancies which had occurred. To remedy this, the legislature, on December 18, 1816, passed an additional act providing for filling the vacancies, the calling of meetings and fixing a quorum; and on December 26, 1816, passed another act imposing the penalty of \$500 upon any person who should assume the office of

president, etc., except by virtue of the preceding acts. The governor and council had previously put the following question to the judges of the superior court of the state: "Whether the legislature of this state has authority to amend the charters or acts of incorporation of literary corporations, by increasing the number of trustees, adding boards of overseers, and prescribing modes of visitation." On December 5, 1816, Ch. J. Richardson and Judge Bell refused to answer this question, upon the ground "that the constitution of this state did not contemplate that the opinion of the justices of the superior court should be required upon a mere question of right between the legislature and individuals;" and added that they felt it to be their duty "not to form any opinion."

Judge Woodward had been the secretary and long the treasurer of the college. There was no whisper against him, but he was the fast friend of Wheelock.

On August 27, 1816, the trustees removed him from the office of secretary; on September 27, 1816, he was removed from the office of treasurer. The university was duly organized under the acts, on February 4, 1817. Judge Woodward was reinstated, and Dr. Wheelock as president of the university; but Professor Allen, the son-in-law of Wheelock, was made acting president until the restoration of Wheelock's health. On April 4, 1817, Dr. Wheelock died, having bestowed upon the university by his last will, property amounting to forty thousand dollars. This summary brings us to—

1. *The Legal History of these Causes.*—The old trustees, in their memorial to the legislature, in 1804, asserted that "*they had* no other interest than the members of the legislature themselves;" and in another to the same body declared that they were "mere stake-holders for the public." Probably for this reason, though the leading trustees had ample wealth, while the college practically had none, they took no steps by spending their own money to test these acts. But when they were in session in 1816, John B. Wheeler of Orford, a farmer and country merchant, said to one of the professors, an old friend, "If the trustees intend to test their rights by a suit at law, and

should want means, I have a *thousand* dollars at their command." The offer was at once transmitted to, and accepted by, the board. Judge Marsh termed it "a light breaking upon blank darkness." The late Professor Adams said, "If it had not been for this unsolicited, unsuspected, unthought-of aid, the great case of Dartmouth College would not have been commenced." Adams was the one to whom Thompson wrote his famous letter (already referred to) relating to his long conversation with Webster, dated July 15, 1815. Henceforth the struggle was between the college and the university, or, to be exact, between the old trustees and the state.

An agreed statement of facts in the first case was drawn up by Judge Farrar, which was signed by the counsel, and afterwards turned into a special verdict. This term of the superior court ended May 24, 1817. Before its close, the cause was ably argued by Smith and Mason for the trustees, and by George Sullivan, the attorney-general, and Ichabod Bartlett, for the state. The cause was continued to the September term, 1817, at Exeter, in Rockingham county, for further argument, as the counsel for the trustees were unprepared to reply as fully as they desired.

The intellectual gifts of the court and counsel were worthy of the greatness of the cause. As but two of them had a national reputation, a brief sketch may not be out of place. The court consisted of William Merchant Richardson, Samuel Bell and Levi Woodbury.

Chief Justice Richardson was forty-four years old. He was a graduate of Harvard, a member of Congress from Massachusetts in 1812, and was subsequently re-elected, but, being averse to political life, resigned and removed to Portsmouth, in his native state, in 1814. From his appointment in 1816, till his death in 1838, he was Chief Justice of the highest court. Physically he was as imposing as he was great intellectually. Like Marshall's, his eyes were black, piercing and brilliant; like Marshall's, his hair was black as a raven's wing; and like Marshall, he had refined and simple tastes; but unlike Marshall, he had a full, high and broad forehead. In learning and industry he ranked with

Chief Justice Parsons. He was a great and honest judge. Some judges owe much of their eminence to their subtlety in judicial fence—a species of cuttle-fish logic. They succeed by darkening. It is oftentimes hard to answer, because difficult to understand them. This great attribute, though not a great judicial quality, Richardson lacked. His reasoning and his heart alike were as open and ingenuous as the light of day. He was revered by the people of the state as no other judge ever was.

Judge Bell was forty-seven years old. His was a family famous for their talent. He was the father of the late Chief Justice Bell; trustee of Dartmouth college (of which he was a graduate,) from 1808 to 1811; judge from 1816 to 1819; governor from 1819 to 1823, and United States senator from 1823 to 1835. He was a man of immense erudition and great business capacity; a thorough lawyer, and possessed of great moral courage.

Judge Woodbury was twenty-eight years old. He was a graduate of Dartmouth; was judge from 1817 to 1819; governor in 1823; United States senator from 1825 to 1831; secretary of the navy under Jackson from 1831 to 1834; secretary of the treasury from 1834 to 1841, under Jackson and Van Buren, and then declined the office of chief justice of New Hampshire. He was again senator in Congress from 1841 to 1845, when he was appointed by President Polk one of the justices of the Supreme Court of the United States, which office he held until his death in 1851. The probabilities are very strong that he would have been president in the place of General Pierce had his life been spared. Of Judge Woodbury, Webster in his letter to Judge Story of January 4, 1824, said, speaking of two appointments that might be made to that bench, "There is no doubt that Judge Woodbury would be one, and he is as sound a man as I know of." Richardson was a Federalist; Bell and Woodbury were both Anti-Federalists. Mason, a competent judge, if ever any man was, said of these judges, that "three more men so well qualified as the present judges, and who would accept the office, could not be found in the state." Mason, Smith and

Webster argued the cause for the trustees, and Sullivan and Bartlett for the state. These were all members of the Rockingham bar, when it was literally "an arena of giants." Of this bar Judge Story said that it had "vast law learning and prodigious intellectual power." At the circuit court for New Hampshire, October, 1812, Judge Story made the following orders: "Whereas, the court have a full knowledge of the learning, integrity and ability of the Honorable Jeremiah Smith and the Honorable Jeremiah Mason, and upon the most entire confidence therein, and being willing to express this opinion in the most public manner as well as a testimony to their merits, as also a laudable example to the junior members of the bar; and the court having taken the premises into their mature deliberation, of their own mere motion and pleasure, have ordered and do hereby order, that the honorable degree of serjeant-at-law be and hereby is conferred upon them, the said Jeremiah Smith and Jeremiah Mason, and the court do further order that they be respected as such by all the officers of this court and all others whom the same may concern, and that this order be entered among the records of the court." "The court, on mature deliberation, do order that the degree of barrister-at-law be and hereby is conferred on the following gentlemen, who are counsellors of this court, viz: Oliver Peabody, Daniel Humphreys, George Sullivan, and Daniel Webster, esquires; in testimony of the entire respect the court entertain for their learning, integrity and ability; and the court further order that this order be entered among the records of the court." At the time of the argument, Smith was fifty-eight years old; Mason, fifty; Sullivan, forty-three; Webster, thirty-five, and Bartlett, thirty-one. Mason was from Connecticut, but read law and commenced practice in Vermont. He was six feet and seven inches in height, and proportionately large in other respects. His intellectual exceeded his physical stature. Webster, with a thorough knowledge of the man, deliberately wrote down that as a lawyer, as a jurist, no man in the Union equalled Mason, and but one approached him; and a quarter of a century

later as deliberately reaffirmed his estimate. Mason had two loves, one desire and one passion. He loved his family, resigning his position as United States senator rather than be separated from them; and next to his family, he loved the law devotedly. He desired a competence, and his passion was a vitriolic contempt. The gifts and graces of the orator were denied to this great man, but on his feet in the courtroom he was seemingly an inspired Euclid.

Smith had been four terms in Congress, judge of the United States circuit court, chief justice of the superior court for seven years; then governor of the state, and then chief justice of the supreme court for three years. He was of Scotch-Irish stock; possessed of great and accurate learning, and of great natural abilities; but, like Mason, he was no orator.

Of Webster, the "black giant of the East," it is only necessary to say that he was in full possession of his great powers.

Sullivan was from Irish and Revolutionary stock—a race of soldiers, orators and lawyers. He was attorney-general, (as his father was before him and his son after him) for twenty-one years; a classical scholar, well read in the law; an excellent special pleader; swift to perceive, prompt to act, and full of resources. He relied too little on his preparation, and too much upon his oratory, his power of illustration and argument. But neither the court, the jury nor the people ever grew weary of listening to his silver tones, or his arguments, that fell like music on the ear.

Bartlett was a "*little* giant," four years younger than Webster, and from the same town. He served three terms in Congress. He was from a family eminent for its physicians, preachers and jurists. He was indefatigable in preparation; eloquent in its highest sense; ready, witty and a popular idol. He was often pitted against Mason and other giants.

The clergymen of the "standing order" with a portion of the old trustees and the faculty, swarmed from their general association into the Exeter court-room. The argument, lasted two days, Mason speaking two, and Smith four hours for the trustees. Sullivan and Bartlett occupied three hours.

the next day in reply. Webster occupied less than two hours in closing the case for the trustees. None of these were taken down in short-hand, but, as afterwards written out from the copious minutes and notes of counsel or otherwise, and in some instances revised, were, except Webster's, reported by Judge Farrar. They occupy about one hundred and eighty pages in Farrar's report, of which forty-three pages were assigned to Mason, who was always comparatively brief; fifty-six pages to Smith, thirty-four pages to Sullivan, and forty-six pages to Bartlett.

Probably in consequence of this revision, arguments on one side were sometimes omitted, while the replies were given. They probably show, fairly enough, the general course of the argument. No summary would do them justice, but an outline of them may be useful. Mason's points, as stated by himself, were "That these acts are not obligatory; 1. because they are not within the general scope of legislative power; 2. Because they violate certain provisions of the constitution of this state restraining the legislative power; 3. Because they violate the constitution of the United States." In Farrar's report Mason devotes twenty-three pages to his first point, eight to the second and six to the third.

1. He urged that, "the only division of corporations material to the present enquiry, is that of civil and eleemosynary;" that the trustees constituted an eleemosynary corporation; that towns "were civil corporations of a peculiar kind;" that the legislature cannot "rightfully take from any such corporation its property, and transfer it to another;" that "somewhat similar to these are incorporated cities." "But where there is a special grant of peculiar privileges, the legislative power to new model or control them, if admitted at all, must be with great limitation. The legislature cannot abolish such corporations, or do anything equivalent to it. As far as the privileges are peculiar, and such as cannot be affected by a general law, it is not easy to see on what principles they can be essentially changed or altered by a special act of the legislature;" that the college "is clearly

an eleemosynary corporation, and of consequence, a private corporation."

He conceded that "the British Parliament can, as it is held, abolish corporations. So it can pass acts of attainder and of pains and penalties. But neither can be done by virtue of the ordinary and legitimate legislative power, which belongs to our legislature. According to the theory of the British government, the Parliament is omnipotent. 'A corporation may be dissolved by act of Parliament, which is boundless in its operations.'"

"Will it now be asserted that the British Parliament or king, or both united, were competent to abolish or new model the colonial charters? If it could be done by legislative power alone, they might, for they possessed the whole legislative power over that subject matter." "The Parliament of Great Britain had no rightful power whatever over this corporation. The legislature of this state succeeded to all the power, which the king, who granted the charter, had, and no more.

"In England the creating of corporations appertains to the king, and he has all the legitimate power that exists for dissolving them, except what is vested in the judicial courts."

"But the king cannot abolish a corporation, or give it a new organization, or alter any of its powers or privileges, without its consent."

"As successors to the king then, the legislature have no power to pass the acts in question, and it may be safely asserted that before the change in the form of government, the plaintiffs could not have been rightfully deprived of their property or privileges, without a trial in due course of law."

"It is of no consequence, as it respects the right, whether the privileges granted to the plaintiffs by their charter, are valuable, in a pecuniary point of view, or otherwise." He then relies upon the opinion in *Calder v. Bull*, 3 Dall. 383, that "the nature and ends of legislative power will limit the exercise of it."

2. That these acts were prohibited by article 15, the *per legem terræ* clause, article 23, which prohibits the passage of

“retrospective laws,” and article 37, of the Bill of Rights of New Hampshire, which declares that the three essential powers of government “ought to be kept separate.”

3. That the grant was “a contract” under the clause in the Federal constitution, “and not a law.” That “there can be no doubt that there were competent parties to the contract; the king of one side, and the trustees named in the charter, of the other.”

Judge Smith urged that the change of name was a violation of “chartered rights.” He enforced the same views as Mason and commented at length upon *Phillips v. Bury*, and other cases relied upon in the opinion of Judge Story. He said, “It is the endowment which confers the right of visitation,” and adds, “Let us now examine the constitution of Dartmouth College. Its original funds arose altogether from the donations of individuals, principally obtained through the agency of Dr. Wheelock. In no sense and in no way can it be said that they originated with the king or the public. Not a cent of money or an acre of land was given by the province or any public body till after the college went into operation.” * * * “Though the state have given lands they were not the real founders. They were not the *first* benefactors, who and who only, are considered as founders.”

“Do the defendants’ counsel contend that if a town should acquire by gift, or otherwise, a fund for the support of a school for the inhabitants of such town, that the legislature could constitutionally annex another town, giving to all the inhabitants of the new corporation equal right to participate in this fund?” * * * “But still Parliament may pass many acts, which our legislature are prohibited from passing.” * * *

“It is the exercise of the same authority that Parliament can dissolve all corporations.”

“Here seems everything requisite to form a compact. The king is one party; the donors in the first instance, and then the trustees, as their *acknowledged substitutes* or representatives are the other party.” * * * “It is too late for the king to quarrel with the terms; he never did.” “The truth

is, the trustees, as a body politic, are the legal and equitable owners of the property and of the franchises conferred by the charter."

Sullivan, for the state, urged that this was a public corporation; that the test, as to whether it was public or private, was not whether it was endowed by the bounty of the government, or that of an individual, but, as was said by Lord Hardwicke, "the *extensiveness* of the objects to be benefitted;" that the charter answered the "questions," For whose benefit was this corporation erected?—for the benefit of the persons composing it, or that of the public?" by setting forth that it was "*for the benefit of said province;*" that "it appears from the charter, that the corporation of Dartmouth College was established for the express, the avowed purpose, of promoting the welfare of a whole province. It was an instrument formed to attain objects in which no individual had a particular interest, but in which the community had a deep one. It was vested with power to hold property, in trust, for the public, but it could hold none for the use of the corporators. It was clothed with various powers, capacities and franchises, all of which were to be exercised for the benefit of the public, but not one of them for the advantage of its own members, or of any individuals whatever. In short it was created—it existed only for public purposes." * * * "If this corporation was a private one, I shall contend that the legislature had a right to alter its charter, so far as the public good required." * * *

"Suppose the lands of a private corporation are wanted for a fortification or an arsenal; may they not be taken? Suppose they are wanted for a highway or for any important public purpose; may they not be taken? * * * Does the law regard the property of corporations with more vigilance than that of individuals? Are the rights of the former more sacred than those of the latter?"

"It is alleged that these acts violate the constitution of the United States. Where a charter of incorporation is granted, there is always, it is said, an implied contract on the part of the government, that the charter shall

not be altered without the consent of the corporation." * *

"If a charter of incorporation be a contract, it certainly is not such a contract as comes within the meaning and spirit of that article in the constitution. * * * The supreme court in Massachusetts have said this was the design of the provision: 'The article respecting the obligation of contracts, as we all know, was provided against paper money installment laws,' etc. * * * It is remarked by Judge Johnson, in the case of *Fletcher v. Peck*, that the state legislatures pass laws impairing the obligation of contracts, yet that these laws appear to be within the most correct limits of legislative powers, and certainly could not have been intended to be affected by this constitutional provision."

"It has been asserted that Dr. Wheelock was the founder, but the assertion is supported by no evidence. * * * The charter, probably in consequence of these exertions, calls him the founder. But this does not make him so."

"The first gift of the revenues is the foundation, and he who gives them is in law the founder. Many individuals made donations; but who made the first? It does not appear. I am instructed to say that Dr. Wheelock made very liberal donations to Moor's Charity School, an institution in the neighborhood of the college, though entirely distinct from it, but that he made none to the college itself. * * * In no part of the charter is it mentioned that he made any donation to the college. If he did, there is no evidence of the fact. It does not appear, then, that he was the founder, or that he had power to transfer the right of visitation to the trustees."

"If Dr. Wheelock is the founder and visitor of the college, he did not transfer to the trustees the right of visitation. There are no words in the charter making them visitors." * *

"The trustees allege that the General Court attempted to compel them to act under an amended charter, and that they had no power to do it. Many cases have been cited on this point, but they only show that the king cannot compel corporations to accept or act under amended charters, not that parliament cannot compel them. The authority of Parliament, as everyone knows, is much more extensive than that

of the king. The king cannot grant to a corporation exclusive privileges; Parliament may. The king cannot dissolve a corporation; Parliament possesses the power. Corporations in this state have frequently been compelled to act under amended charters."

"Suppose the trustees had been guilty of great abuse of their trust, an information had been filed on it, and their charter had been declared forfeited. What would have been the consequences? Would the trustees have lost anything? Not a cent. The public, and not the trustees, would have been the sufferers."

"In the first place, we are told that the corporation is placed beyond the control of the legislature. They have no authority to amend its charter; to touch its property; to take from it a single right or privilege; or to limit the exercise of any one of its powers. In the next place, we are told that the trustees are visitors of the college and of the application of its funds. This places them beyond the control of every court of law, let them do what they will with the property given to the institution. 'The sentence of a visitor, on subjects within his jurisdiction, is final and conclusive, and the king's courts cannot in any form of proceeding review the sentence.' 2 Kyd on Corp."

"It is within the jurisdiction of a visitor, it is his duty, to see that the funds given to the institution of which he is a visitor, are properly applied; and when he decides, his sentence is conclusive on all courts. Suppose the trustees should appropriate the funds of the college to their own use. If they are visitors as to the application of the funds, as is contended, no court of law can make them accountable. A visitor is himself subject to no visitation, to no control. Where is the man, though possessed of the most charitable and benevolent feelings, that would give to a corporation raised so far above all responsibility? Such a corporation is a monster, that would devour all charities! The very sight of such a monster, placed beyond all legislative, all judicial control, like the terrific head of Medusa, would convert even Charity herself into stone! * * * That a corporation,

created for the sole purpose of promoting the public interest, may be altered in such a manner as the public interest requires, is a principle as obvious to common sense as any that can be imagined."

Bartlett states the position of Mason and Smith to be :

1. " That the legislative acts in question are contrary to the principles of natural justice.
2. " That corporations of this nature are independent of legislative control.
3. " That the provisions of these acts violate the constitutions of New Hampshire and the United States."

He then argues that the first point is too indefinite ; that no court is warranted in setting aside any law because the judges may think it is contrary to natural justice ; that the provision abolishing the oath of allegiance to the king, or the section guaranteeing freedom of religious opinion, is not in violation of natural justice ; that all the authorities show, that changing the name, changes none of the rights, duties, powers or privileges of the corporation ; that the state had not confiscated corporate property, but renovated the corporation, and added new members, according to the decision in *King v. Pasmore*, 3 Term, 241-244 ; that Ashhurst, J., was right when he said in that case, " As to there being a dissent of a majority of the old members, I lay no stress upon it."

* * * * *

" Here the members of the old body have no injury or injustice to complain of, for they are all included in the new charter of incorporation, and if any of them do not become members of the new incorporation, but refuse to accept it, it is their own fault ;" that *Philips v. Bury*, 4 Mod. Rep. 117, showed that the universities in England and institutions of a similar nature in this country, were public corporations ; that the English doctrine, that corporations could be dissolved by act of Parliament " had been long exercised in practice," in Great Britain and the colonies, citing the Land Bank and South Sea schemes ; the statute declaring all corporations and licenses granted by Henry VI void ; the abolition of monopolies by Parliament ; the frequent changes

in the admission fee of trading companies, in the number of their members, and their qualifications; the radical changes in the act of 5 George III in the African corporation, created by the act of 23 George II; the case of Manchester College, in which Parliament by act of 2 George II, annulled the powers of a special visitor and vested them in the crown; the abrogation of the oaths of allegiance and supremacy, by the act of 1 W. & M., which provided for vacating the office of head patron in St. John's College, if the incumbents refused to take the new oath.

He also referred to the act passed by Connecticut in 1723, enlarging the number of trustees of Yale College, fixing a quorum, creating new officers, and establishing other regulations without the consent of the corporation; to the act of Massachusetts in 1673, adding to the members of the corporation of Harvard College, against the will of the corporation; and to the repeal of the provision in the charter of Trinity church, in regard to "induction" by the state of New York, by the act of 1784.

He concluded this branch of his argument with offering "to abandon the defence, when one unequivocal authority shall be produced by the plaintiffs to show that the exercise of such power was ever judged illegal." * * *

"But the plaintiffs have insisted that 'it is a *private eleemosynary* corporation' and that statement is attempted to be supported in the first place by confounding this institution with Moor's Indian Charity School, which Dr. E. Wheelock claimed as his, and over which no other jurisdiction has been exercised, but at his request. Now, no fact on record is more clearly stated, than that this institution and Moor's Indian Charity School were entirely distinct and independent of each other in their origin and establishment; were ever governed separately, without the least connection, until the school solicited the interference of the legislature and college. Their funds and property are now distinct and separate. For proof of this we need no more time than is necessary to read the record of a vote passed by the plaintiffs, May 7, 1789, as follows: 'Representations having been made to this board,

that apprehensions have arisen in the minds of some persons, that moneys collected in Great Britain by the Rev. Messrs. Whitaker and Occom, for the use of Moor's Charity School, under the direction of Rev. Dr. Wheelock, have been applied by this board to the use and benefit of Dartmouth College ;—*Resolved*, that this board have never had any control or direction of said moneys, nor have they to their knowledge, at any time received or applied any sum or sums thereof to the use and benefit of said college,' etc. A letter of instruction to Dr. Wheelock from the honorable board of trustees of that school in England, April 25, 1771, states that 'the corporation of Dartmouth College in its nature and designs differs from the establishment of their school,' and forbids Dr. Wheelock from subjecting the school or its funds to the disposition of that institution."

He then replied at length to the argument that the acts in question were prohibited by the state constitution, urging that the provisions referred to were but a re-enactment of the great charter, which had not been invaded in the cases cited.

"But at last it is insisted that these are '*laws impairing the obligation of contracts.*' Finding that the straws they have seized upon in the struggle cannot support their sinking claim, with the eagerness of desperation, they grasp at this shadow of a pretence. If any interpretation of that clause can be made applicable to the present case, all the benefits surely should be awarded to the plaintiffs' counsel as the first discoverers. Most unquestionably by the survivors of the convention who framed that instrument, such an idea would now be deemed original."

"In a case much stronger than the present, it was considered by the counsel as well as the court (Brown v. Bank, 8 Mass. 448) that 'the *notion* of a contract between the government and corporation was *too fanciful* to need any observation.' * * * That scholastic subtlety and ingenuity by which the plaintiffs would raise a contract in this transaction, would prove quite too much for their purpose, for in some sense even government itself is a contract, and

by the same reasoning every act and every law must be considered in the nature of a *contract*, until the legislature would find themselves in such a labyrinth of contracts, with the United States constitution over their heads, that not a subject would be left within their jurisdiction." * * *

"The plaintiffs, however, say, an express contract exists here; that they, and they alone, shall be trustees of this institution. * * * By a reference to the charter it will appear that the *corporation* was created independent of the trustees; and that they were afterwards appointed in a different clause of the charter. * * *

"The provision in the charter with regard to the number, was intended as a regulation to limit the board in their appointments, and not with a view to control the legislature. * * * Who are the parties to all these contracts? Can there be any other, either express or implied, than the founder, the *power creating* the corporation and *those for whose benefit* it is established? As a public institution, we believe the *crown* has been shown to be the *founder*. Or even as an eleemosynary corporation, that the rights of foundation rest in the crown, from the public endowments. The crown also was the *power* that created it. The state, since the Revolution, succeeds to the rights of the crown. *Terrett v. Taylor*, 9 Cranch, 50."

The counsel all agreed that if proceedings could be successfully instituted in the name of the state for a forfeiture, the college funds would go back to the donors or their heirs, and that no court of chancery existed to correct abuses, unless the legislature had such powers, which the counsel for the plaintiffs denied.

More than three hundred references were made by the various counsel to decided cases, statutes and standard works of authority.

Webster was not always equally great and impressive. Sometimes he was comparatively dry, heavy and uninteresting. A great subject and a great occasion would always bring out his cold, unimpassioned logic. But when hard pressed or weighted down with responsibilities, as he was in this case, he apparently became charged with volcanic fire.

His argument at Exeter was never reported, but tradition, public prints and old letters, point to but one conclusion. If not the greatest, it was one of the most brilliant efforts of his life, and produced a most extraordinary effect. He closed with the "Cæsar in the senate house" peroration, which was so much admired by Professor Goodrich and others, when he recited it at Washington (1 Life of Webster, 170), and the court adjourned in tears.

The counsel for the state were overmatched, but they were able men, and, in comparison with what in other hands afterwards befel their cause in Washington, handled it with consummate skill. The counsel for the trustees differed in their views, as will hereafter appear, upon a single point, which was understood by the opposing counsel and the court to have been waived or abandoned. Upon the other points, they were a unit in argument, whatever their private convictions might have been. Their strategic plan was to carry the state court with them if possible, and, failing in that, to break the force of an adverse decision by dividing the court. To accomplish this, they put forth all their powers, but failed. The judges continued the cause for advisement till the November term, at Plymouth, 1817. On November 6, 1817, the chief justice read the unanimous opinion of the court, adverse to the trustees, which occupies nearly 30 pages in Farrar's report. Its pith is stated in the head-notes in 1 N. H. 111, which were undoubtedly prepared by the chief justice :

1. "The corporation of *Dartmouth College* is a public corporation."

2. "An act of the legislature adding new members to such a corporation, without the consent of the old corporation, is not repugnant to the constitution of this state."

3. "The charter of the king, creating the corporation of *Dartmouth College* is not a contract within the meaning of that clause in the constitution of the *United States*, which prohibits states from passing laws impairing the obligation of contracts."

The court say, "This cause has been argued on both sides with uncommon learning and ability, and we have witnessed

with pleasure and with pride a display of talents and eloquence upon this occasion in the highest degree honorable to the profession of the law in this state. If the counsel of the plaintiffs have failed to convince us that the action can be maintained, it has not been owing to any want of diligence in research, or ingenuity in reasoning, but to a want of solid and substantial grounds on which to rest their arguments."

The court define at length the characteristics of private and public corporations. They do not assume, as has so often erroneously been said, but decide that this was a public corporation, and give the reasons therefor. They say: "Public corporations are those which are created for public purposes, and whose property is devoted to the objects for which they are created. The corporators have no private beneficial interest, either in their franchises or their property. The only private right which individuals can have in them, is the right of being and acting as members." * * *

"A corporation, all of whose franchises are exercised for public purposes, is a public corporation. * * *

Because in both cases all the property and franchises of the corporations would in fact be public property. A gift to a corporation created for public purposes is in reality a gift to the public. * * *

Whether an incorporated college, founded and endowed by an individual, who had reserved to himself a control over its affairs as a private visitor, must be viewed as a public or as a private corporation, it is not necessary now to decide, because it does not appear that Dartmouth College was subject to any private visitation whatever."

After quoting at length from the charter, the court say: "Such are the objects and such the nature of this corporation, appearing upon the face of the charter. It was created for the purpose of holding and managing property for the use of the *college*, and the *college* was founded for the purpose of spreading the knowledge of the Great Redeemer among the savages and of furnishing the best means of education to the province of *New Hampshire*. These great purposes are surely, if anything can be, matters of public concern. Who

has any private interest either in the objects or property of this institution! The trustees themselves have no greater interest in the spreading of christian knowledge among the Indians, and in providing the best means of education, than any other individuals in the community. Nor have they any private interest in the property of this institution, nothing that can be sold or transferred, that can descend to their heirs, or can be assets in the hands of their administrators. If all the property of the institution were destroyed, the loss would be exclusively public, and no private loss to them. So entirely free are they from any private interest in this respect, that they are competent witnesses in causes where the corporation is a party, and the property of the corporation in contest. * * *

They, [the trustees,] have no private right in the institution, except the right of office, the right of being trustees, and of acting as such. It therefore seems to us that if such a corporation is not to be considered as a public corporation, it would be difficult to find one that could be so considered. * * *

All private rights in this institution must belong either to those who founded, or whose bounty has endowed it; to the officers and students of the college, or to the trustees. As to those who founded or who have endowed it, no person of this description who claims any private right has been pointed out or is known to us."

"It is not understood that any person claims to be visitor to this college. An absolute donation of land or money to an institution of this kind creates no private rights in it. Besides, if the private rights of founders or donors have been infringed by these acts, it is their business to vindicate their own rights. It is no concern of these plaintiffs. When founders and donors complain, it will be our duty to hear and decide; but we cannot adjudicate upon their rights till they come judicially before us." * * *

"But it is said that the charter of 1769 is a contract, the validity of which is impaired by these acts in violation of that clause in the tenth section of the first article of the constitution of the United States, which declares that 'no state shall

pass any law impairing the obligation of contracts.' It has probably never yet been decided that a charter of this kind is a contract, within the meaning of the constitution of the United States. None of the cases cited were like the present. * * *

This clause in the constitution of the United States was obviously intended to protect private rights of property, and embracing all contracts relating to private property, whether executed or executory, and whether between individuals, between states, or between states and individuals. The word contracts must, however, be taken in its common and ordinary acceptation as an actual agreement between parties, by which something is granted or stipulated, immediately for the benefit of the actual parties. But this clause was not intended to limit the power of the states, in relation to their own public officers and servants, or to their own civil institutions, and must not be construed to embrace contracts, which are, in their nature, mere matters of civil institution; nor grants of power and authority, by a state to individuals, to be exercised for purposes merely public. Thus marriage is a contract; but being a mere matter of civil institution, is not within the meaning of this clause. A law, therefore, authorizing divorces, though it impairs the validity of marriage contracts, is not a violation of the constitution of the United States." * *

"The distinction we have here endeavored to lay down, between the contracts which are, and which are not intended by that instrument, seems to us to be clear and obvious. If the charter of a public institution, like that of Dartmouth College, is to be construed as a contract, within the intent of the constitution of the United States, it will, in our opinion, be difficult to say what powers, in relation to their public institutions, if any, are left to the states. It is a construction, in our view, repugnant to the very principles of all government, because it places all the public institutions of all the states beyond legislative control. For it is clear that Congress possesses no powers on the subject. We are, therefore, clearly of opinion that the charter of Dartmouth College is not a contract within the meaning of this clause in the constitution of the United States."

"But admitting that charter to have been such a contract, what was the contract? Can it be construed to be a contract on the part of the king with the corporators, whom he appointed, and their successors, that they should forever have control of the affairs of this institution, and be forever free from all legislative interference, and that their number should never be augmented or diminished, however strongly the public interest might require it? Such a contract in relation to a public institution would, as we conceive, be absurd and repugnant to the principles of all government. The king had no power to make such a contract, and thus bind the sovereign authority on a subject of mere public concern. Nor does our legislature possess the power to make such a contract." * * *

"A distinction is to be taken between particular grants, by the legislature, of property or privileges, to individuals for their own benefit, and grants of power and authority to be exercised for public purposes. The former is, in its nature, special legislation in relation to private rights; the latter, is general legislation in relation to the common interests of all. Chief Justice Marshall, in the case of *Fletcher v. Peck*, 6 Cranch, 135, adverts to this distinction, where he says: 'The correctness of this principle, that one legislature cannot abridge the powers of a succeeding legislature so far as respects general legislation, can never be controverted. But if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made; those conveyances have vested legal estates; and if these estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.' We are, therefore, of opinion that if this charter can be construed to be a contract within the meaning of the constitution of the United States, yet still it contains no contract binding on the legislature, that the number of trustees shall not be augmented, and that the validity of the contract is not impaired by these acts."

Webster said of this opinion (letter to Story, Sept. 9, 1818),

“The truth is, the New Hampshire opinion is able, ingenious and plausible.” But in general it has never received from others “scanty justice.” If the state court erred, it did so aside from the point referred to, and a few authorities cited upon another, with all the light that could be thrown upon it. The private correspondence of the counsel shows, with the exceptions named, that nothing new, as a *legal* argument, was advanced at Washington. A comparison of the arguments before the two courts brings us to the same conclusion.

The counsel entered into the following stipulation, which went up with the special verdict: “It is agreed by the parties that, if the plaintiffs shall recover by the judgment of the Supreme Court of the United States, they shall accept the delivery of the articles mentioned in their declaration, in full satisfaction of the damages recovered. It is also agreed that no advantage shall be taken in the Supreme Court of the United States of any want of form in the proceedings, and that the counsel then may add any facts, documents or records to the special verdict, to be taken and deemed a part thereof, or expunge any fact therefrom which, in the opinion of the counsel or Supreme Court, may be necessary to the obtaining of a decision on the validity of the acts of the legislature of New Hampshire, recited in the special verdict; and that, if the said acts are adjudged to be valid, the judgment is to be affirmed, otherwise, reversed. It is also agreed by the plaintiffs’ counsel, in order that the same question may come fairly before the court, that the demand, refusal and conversion stated in the special verdict, shall be considered as made and done on the day preceding the commencement of this suit.”

Subscription papers were circulated, and Webster took up a heavy collection among the Boston merchants to defray the expenses of the further litigation. All the counsel retained their connection with the cause, but none on either side were so situated as to attend to it at Washington, except Webster. The trustees, the faculty and his associates, handed over the cause to him with power to procure such assistance as he desired. The other side, for some reason which nobody

seems to understand, was committed to John Holmes, of Maine, to whom Jefferson wrote his celebrated "fire-bell in the night" letter; to William Wirt and—at too late a day—to Pinkney.

[TO BE CONTINUED.]

III. THE WORKS OF JOEL PRENTISS BISHOP.

I. The Difficulties of Authorship. II. The Requisites of a Good Treatise on Law. III. The Classes of Books on Unwritten Law. IV. The Value of Treatises. V. The Works of Joel Prentiss Bishop—He has accomplished the following Results:—1. He has stated the Law correctly. 2. He has stated it on Legal Principle and Reason. 3. He has established Legal Doctrines, as the Result of Adjudication, not stated by Judges or other Text Writers. 4. A large part of Bishop's Books consists of Legal Doctrine not found in those of prior Authors. 5. The New Matter introduced by Bishop is the Most Important of all. 6. Bishop's First Book of the Law. 7. Bishop on the Law of Married Women.

I. The Difficulties of Authorship.—There is perhaps no country where it is so difficult to write a really accurate and trustworthy elementary treatise on most branches of the law, as in the United States. In England there is but one general legislative body, the Parliament. There, the House of Lords is the highest court, and its decisions are law in all the judicial tribunals, irreversible except by the same high authority. There, the common law, comprising the great body of the law, is substantially a unit. There, no question can arise as to the constitutionality of an act of Parliament. There, indeed, is constitutional law, but no subordinate or conflicting constitutions. There, an elementary treatise on law, based on general, recognized principles, developed by judicial determination, may on most subjects present a uniform system.

But here, our *written* law is found in the national constitution; in treaties with foreign nations and the Indian tribes; in acts of Congress, general in their application to the high seas or the states of the Union—local in their application to the territories and the District of Columbia, to forts, magazines, arsenals, etc., purchased within the states; in thirty-six state constitutions, and statutes enacted by as many legislatures; in English statutes in force in most of the states, and in territorial statutes; besides the legislation of local municipal bodies.

Here, our *unwritten* law consists of international law; to a

limited extent for certain purposes, in a national common law ; in the common law of the District of Columbia ; in the common law of the several states and territories ; in English statutes adopted by common consent as common law "so far as applicable to our circumstances and condition:" besides (if I may be allowed the expression) the common civil law which we inherited from the French Republic over a portion of the "Louisiana Purchase," and the Mexico-Spanish common law in Texas, New Mexico and California, to say nothing of the Russo-common law of Alaska. Added to all these, are our systems of equity, admiralty, military, martial and probate law, each having its written and unwritten rules, with appropriate tribunals for their administration. These systems of laws are developed in thousands of volumes, comprising the recorded usages of nations ; the usages between our general government and the states and Indian tribes ; the usages between the states and territories ; the history, habits and usages of the people ; and the decisions of courts of almost every conceivable jurisdiction, involving not only questions of principle, but questions of conflict between constitutions and statutes, between national and state authority, between written and unwritten law, and between different systems and tribunals. This is but a faint outline of the difficulties which an author encounters, who undertakes to write an elementary treatise on almost any branch of law. He must explore all these sources of the law, English and American, bring order out of chaos, and reduce into system, as a learned and practical science, that which is otherwise confusion. A writer on English law encounters all the difficulties presented by statutes and unwritten law, of all classes, and different tribunals having jurisdiction of them, with the ecclesiastical courts, and law growing out of the union of church and state, which latter do not exist in this country.

If the law were (1) a system of mere *arbitrary rules*, and if (2) these could by any possibility be made to meet the exigency of every case that could arise, and if (3) it were possible to anticipate all these, and find appropriate language to cover them, and (4) if circumstances never changed to render a rule

proper at one time, and unnecessary or wrong at another, then the task of writing a law book would be simply the work of recording these rules. But none of these conditions are possible. The Supreme Intelligence has not even attempted this in the laws He has given us. All law, human or divine, consists of *principles*. All these systems and laws, except treaties, constitutions and statutes, teach by precept and example. Constitutions, treaties and statutes may prescribe arbitrary rules. But these constitute only a comparatively small part of the law which defines rights and wrongs, which protects the former and punishes the latter. The common law, with its cognate principles of equity, admiralty, military and martial law, and the laws of nations, constitutes by far the most extensive, comprehensive, rational, instructive and useful portion of our entire systems. These rest on reason—these are “the perfection of reason.” “Reason is the life of the law.”¹ “When the reason [of any law of these classes] ceases, the law itself ceases.” These change to meet the wants, circumstances and conditions of society. These embody the spirit of progress. Like the activities of intellect and the history of man, these are ever onward.

II. The Requisites of a Good Treatise on Law.—Elsewhere I have stated what I regard as the essential requisites of a *complete* and *perfect* book on any branch of unwritten law.²

¹ Co. Lit. 97 *b*; Bishop's First Book, § 73; Coggs v. Bernard, 2 Ld. Raym. 909–911.

² American Law Register, April, 1873, page 221. There is more necessity for commentaries in this country than in England, because of the number of our courts and jurisdictions, legislative and judicial. Commentaries in some sense operate as a supreme revisory tribunal, tending to secure uniformity by bringing together the legislative and judicial determinations of all the states, and by deducing from all a system based on the logic of right reason. And this is more practicable than might at first be supposed. It seems a misfortune necessarily arising out of the nature of our state governments, that we have no overruling authority to revise and correct the errors and antinomies of our legislatures and judicial tribunals. On a few subjects, Congress and the United States Supreme Court have a jurisdiction to which the states must yield. On all others, each state is supreme within its own territory. The inconveniences of this situation are constantly apparent. The law

This would embrace the rise, history, adjudications on, changes of, and exceptions to, every rule or principle of law on a given subject, the reasons on which all rest, and the written law affecting them. It would be a philosophical,

of most of the states, being derived from England, is still, to a very great extent, the same as that of the mother country. We have, it is true, made essential changes in our forms of government, by adopting written constitutions to declare great principles and to regulate legislation, and by abolishing all titles of nobility and all hereditary rank, primogeniture, and the preference of males in descent. We have almost everywhere rendered divorce more easy, and improved, in many respects, the legal condition of married women. We have changed the fundamental rules of evidence of the common law, in many of the states, by rendering parties to suits, persons charged with crime, and those interested in the event of suits, competent witnesses. In regard to evidence, however, we move side by side with England.

There is a great similarity, frequently, almost, if not quite, identity, in the changes which the different states have made in the common law. On first thought one should suppose that thirty or forty legislatures constantly at work in modifying the law, and as many supreme courts every year making decisions affecting the old and new branches of jurisprudence, would render it a hopeless task, on many legal subjects, to write books which would be useful in every state. But a little reflection shows that the points of identity of the laws in most of the states are incomparably more numerous than the diversities. For instance, adultery, desertion, and cruelty are causes of divorce in most of the states; hence, what constitutes these offenses, and what is evidence of them, are the same or nearly the same, in the states where divorces are allowed on these grounds. Arson, larceny, burglary, forgery, etc., are crimes in every state. The changes in the law of bills of exchange, promissory notes, insurance, commercial contracts, and other contracts, effected by legislation and judicial decisions, are very small, compared with the great mass which remains unchanged.

The legislative divergencies of our states from the English law, whether they be considered progress or not, have, as already intimated, been generally in the same direction. It is certainly most desirable that the judicial decisions on the same questions should be uniform in all the states. Unfortunately there is too often a conflict in these decisions. As the intercourse between the states by land and water, already enormous, is constantly increasing, and the same man frequently not only has business in several states, but becomes successively a citizen of two or more, it is very desirable that his legal rights and duties in every state should be alike; so that, wherever he trades and wherever he goes, he may feel that the same law is extended over him and his property. It is

historical, bibliographical, critical and doctrinal discussion, going to the bottom of all logic and morals. But this would be impossible without devoting a life almost to each great topic of the law, and, when finished, it would be a literary thesaurus so voluminous as to be inapplicable to practical and popular wants.

III. The Classes of Books on Unwritten Law.—The books upon unwritten law are generally *digests* or *elementary treatises*. The former are valuable as mere *indices* pointing to where the law may be found, sometimes philosophically discussed. They are useful to a lawyer who understands the philosophy of the law, as indicating mere naked decisions or rules of law, generally without giving the reasons on which they rest. But the lawyer or judge who studies only these, or relies on them, is almost sure to be misled, just as all men must be,

so, to a great extent. But a writer like Mr. Bishop, who carefully demonstrates the principles which cases establish, presenting them in a strong light, and at the same time compares conflicting decisions and points out, with a judgement rarely if ever mistaken, those which violate principle, is a great public benefactor.

In this country it is far easier to get erroneous decisions corrected than it is in England. There, the decisions of the highest court are regarded as authority settling the law, until they are overruled by the same court or the House of Lords. And a decision of the House of Lords is law in all courts. In this country the decision of one state court has no authority except in the state where it is given. Hence, if a case be decided in Ohio, it has no weight as authority in the courts of New York or Massachusetts. And in these latter states the reasons for the decision given by the court deserve no more attention than the arguments of counsel, or the reasons of a text writer for or against the decision.* It is evident that an author like Mr. Bishop will do much to give currency all over the country to sound doctrines coming from any quarter, and at the same time to prevent false doctrines which are enforced in one state from infecting others. He is already an authority. He will become more so in future, as the profession recognizes more and more his thorough mastery of the subjects of which he treats. His researches will relieve judges and lawyers, in many cases, from the necessity of examining many reports, and thus save them from an infinity of labor.

* It was said, in a recent Irish case, that the decisions of American courts are entitled to the weight to be accorded to the opinions of professors of the common law. *Conroy v. Belfast and Nor. Co. Ry.*, 9 Irish Law Times Report, 220. [ED. S. L. R.],

who do not reason from legal principle. Without this no man can correctly apply mere naked rules or decisions.

The *elementary treatises* constitute a higher order of law books—that is, when properly written. But it is to be regretted that too many of the books which profess to be such, are after all mere *digests*—mere compilations arranged with more or less of system, but from which it is impossible to learn or apply law as a science—law as a system of reason governed, controlled, and often modified by circumstances—law as perfected ethics and irresistible logic.

The immense number of statutes and reported cases, both constantly increasing, besides the usages which prevail as law, all render it impossible for lawyers or judges to buy, much less study fully, all these sources to which a law writer looks.

IV. The Value of Treatises.—Then a law writer who is a profound *student* and *thinker*, can on subjects which have been long and fully litigated in courts, better decide what the law is, taken as a complete and connected science, than judges who, as too often happens, only examine such of the cases as may be presented which seem to shed light on a particular cause under investigation. A law writer, too, can devote to a book all the time requisite, while judges often can give but limited time to the consideration of the most important subjects. I do not undervalue the profound learning, the unanswerable logic, the deep philosophy of our ablest judges, or the ethical and legal value of their decisions, often expressed with an accuracy, precision, force and clearness which leave no room to add to their wonderful and surpassing excellence. But after all, the decisions of these must be arranged into a connected system so as to be understood as a science, and differing conclusions must be reconciled or contrasted in a form to leave no doubt as to which is right. This is the work of the text writer. His is the book on which the profession must mainly rely, reserving the right to explore the sources from which it is drawn, and to test the reason on which it proceeds.

This country more than any other has been prolific of late

years in text books on the law. Some of them will perish before their authors. Some will survive in many of their leading ideas and principles, if not in exact form, as long as the principles of the common law are known and administered among men.

V. The Works of Joel Prentiss Bishop.—Of this latter class are the works of Joel Prentiss Bishop which I propose briefly to notice.³

He had peculiar opportunities and has evinced special aptitude for writing law books. For years engaged in the active practice of the law, he commenced to write his work on Marriage and Divorce, which he finished without nominally withdrawing from the active duties of his profession. But when he made engagements to write his works on Criminal Law, he withdrew from practice to devote his time exclusively and give his undivided attention to the great undertaking. This gave him great opportunities and large advantages—such as but few American authors have enjoyed. Kent indeed gave the profession his Commentaries of surpassing value and excellence, though much of his life was devoted to official duties. It was not possible for Justice Story, by his own *unaided* exertions, to perform his official and other

³ His law books are :

1. "Commentaries on the Law of Marriage and Divorce, with the Evidence, Practice, Pleadings, and Forms; and of Separations without Divorce, and of the Evidence of Marriage in all Issues. By Joel Prentiss Bishop. Fifth Edition, revised and enlarged. Boston: Little, Brown, & Co. 1873. 2 vols. 8vo.

2. Commentaries on the Criminal Law. By Joel Prentiss Bishop. Fifth Edition. Boston: Little, Brown, & Co. 1872. 2 vols. 8vo.

3. Commentaries on the Law of Criminal Procedure, Pleading, Evidence, and Practice in Criminal Cases. By Joel Prentiss Bishop. Second Edition, revised, rearranged and enlarged. Boston: Little, Brown, & Co. 1872. 2 vols. 8vo.

4. Commentaries on the Law of Statutory Crimes. By Joel Prentiss Bishop. Boston: Little, Brown, & Co. 1873. 8vo.

5. Commentaries on the Law of Married Women, under the Statutes of the Several States, and at Common Law and in Equity. By Joel Prentiss Bishop. Boston: Little, Brown, & Co. 1873. 2 vols. 8vo.

6. The First Book of the Law. By Joel Prentiss Bishop. Boston: Little, Brown, & Co. 1868."

duties, and write his voluminous and valuable works. He has, indeed, produced numerous volumes, but most of these resulted in part from the labor of others, guided and moulded by his master mind and persevering industry. But with all this, too many of Story's books bear the marks of haste, and want of thorough research. His style is by no means of that compact, terse, and faultless character which ample time would have enabled him to perfect. Too often the principles of law he announces are clothed in an amplitude of words which rather obscures than elucidates his subject.

But Bishop has devoted all the time requisite to the thorough study and comprehension of his subjects and to adopt a style of expression suited to them, and in all he has succeeded admirably well.

The value of a book depends upon its *plan* and its *matter*. Bishop has adopted that orderly *plan* which systematic and scientific discussion requires, so that each topic discussed naturally leads to and elucidates what follows, and every feature comes in its regular and appropriate order. Added to this is an admirable arrangement of sections, peculiarly American, a great improvement not sufficiently appreciated by English law writers.⁴

⁴ The legal press has extensively noticed and commented on the works of Bishop. Distinguished judges and lawyers have, by letters and otherwise, expressed their opinions, some of which have been published.

The Hon. D. M. Bates, Chancellor of Delaware, in a letter Sept. 2, 1870, writing of vol. 1 of "Married Women," says :

"I have read its discussion of several subjects which have heretofore interested me, finding more than usual facility and satisfaction in the perusal, in consequence of your plan of dividing a chapter into short sections, with a sub-heading to each, and an orderly development of the several topics involved in the general subject. This improvement in text book writing you have carried farther than any author I have yet met with ; and it will be fully appreciated by judges and practitioners who, under pressure, are seeking the elucidation of some single point. I observe also that, upon many questions which upon authority are left in some doubt, you have given the course of the decisions historically, presenting to the reader at one view the entire field of adjudication. This has been with me a favorite mode of investigation, and no conclusion which does not result from it ever satisfies me upon a question of any doubt. The value of this mode of treating a subject is strikingly appar-

I will now state what is apparent as the *principles* on which the author proceeded in writing his books, and some of the *results* which he has accomplished. The leading object evidently has been to *ascertain* and *clearly state* the *rules of law* which actually govern the administration of justice in the courts as guides for the adjudication of cases. In this he has been eminently successful. Certainly no English or American author has surpassed him. He has occasionally ventured a hint as to how the law should be, but not very frequently. His books are devoted mainly to a statement of *what the law is*, and this he has generally done with as nice and exact accuracy as in the nature of things was attainable.

He has recognized the fact that the law, other than the statutes, administered in our courts, is the creation, not of a
ent in your chapter upon the wife's equity to a settlement, particularly upon the question whether a court of equity will interfere, and to what extent, to protect the wife's equity against a proceeding at law by the husband, to recover her property. Your treatment of this vexed question relieves it of much of its perplexity, and should leave us free to rest the wife's equity upon general principles of justice applicable to the subject-matter, rather than upon the mere accident of the fund being sued for in the one jurisdiction or in the other; or, if in a court of equity, upon the attitude of the parties, as, whether the bill were filed by the husband seeking to recover the property, or on behalf of the wife claiming a settlement. It has seemed to me that the English court of chancery, while assuming the special protection of married women, have been sometimes over-cautious of its powers in this direction. My attention was especially interested in your concluding chapter, being a general view of the law on this subject as it is, with some suggestions for its improvement. Much as this topic has been agitated, I have met with no effort, before your own, to present a plan of amendment founded upon a comprehensive view of all that the subject involves—the rights of the husband, as well as of the wife, and the general interests of society. as these depend upon the unity of the family in all that concerns its welfare. All our legislative schemes thus far have been constructed upon partial views, looking only to the one end of protecting the wife. Your plan, as I gather it, is to preserve intact the *corpus* of the wife's estate, real and personal (*i. e.*, of a wife not acting as a *feme sole*), not allowing even husband and wife together to convert it, except for the family support; but the income of her estate, together with all the husband's property, to be liable for the support of the family, and to debts incurred for that purpose; the husband and wife to be jointly suable for such debts," etc.

single judge, but of multitudes of judges, no one of whom has, as a general rule, read all the cases on any given subject, or attained a complete and comprehensive view of all the law, of which the decision of a particular case may form a part. A judge, in deciding a particular case, necessarily studies the particular points involved in it. In discussing and deciding these, he is liable to utter *dicta* on collateral questions which he has not so thoroughly studied, and these may be often erroneous. These are not "authority." Sometimes judges content themselves, in the decision of cases, with resting their conclusions on what are apparently *cases in point*, when the real *principle* involved, and the reasons on which it rests, are totally different. As a consequence of all this, there are often found conflicting *dicta*, conflicting decisions, and adjudged cases which rest on others having no application to the *true principle involved*. All these, taken as a whole, can be no more than approximations toward the actual truth of the law. Occasionally, indeed, they will be found to be strictly accurate; but, viewed as absolute legal doctrine, they are not generally quite so. Neither, when viewed thus *as absolute GENERAL legal doctrines*, are they generally meant by the judges who utter them to be accurate. The highest aim intended by them is that they shall be reasonably accurate statements of the doctrines *applicable to the special facts under discussion*, not reaching further than that. A doctrine may be so contracted as to be entirely misleading when viewed in the general way—a mere segment of the circle which constitutes the absolute doctrine—and yet be precisely adapted to the narrow facts which the judge is contemplating, in a particular case, and accurate when interpreted by those facts. Therefore our law reports contain comparatively few of those more *comprehensive statements of general legal doctrine* which the writer of an elementary treatise should embody in his work, and which Mr. Bishop has so successfully made a leading feature of his valuable books. And the same is true of a large part of the books which pass under the name of law treatises. Most of the English books which bear this name, and not a few of

the American ones, are written by comparatively young men, who have not yet attained a high rank in the profession, and who, almost necessarily without very profound knowledge of the law, deem that if they can find a *judicial utterance* for what they say, they are justified, and they seek no further. Then, again, the habit of many competent authors is to go into a law library, take down the books, hunt up the cases, and write as they go along; possessing, therefore, at each step, no more knowledge of the subject than an able lawyer has, who argues a case in banc, and little more than the judge who delivers the opinion deciding a particular case.

For these reasons a writer, who like Mr. Bishop *goes to the bottom* of all the learning on a given subject, cannot content himself with classifying and stating in systematic form what has already been decided or written. This, indeed, is very liable to mislead any but a profound student and thinker. He alone can eliminate from all these sources, the *true principle of the law* in its comprehensive scope, in its exactness of statement, in a form to be clearly understood by the student, the lawyer, the judge and the legislator, and consequently to be readily applied in the administration of justice and in the practical affairs of life. In all these respects Mr. Bishop has been eminently successful.

A writer cannot accomplish these results without a *thorough study* of all the decided cases, English and American, including not only those cited in his work, but those which have become obsolete. For it is necessary to know *what the law was* and the *reasons for it*, in order to ascertain what *it now is*, as resulting from *reasons still operating*, or from those which have ceased to operate. Mr. Bishop has evidently qualified himself to write by the requisite study stated.

In this connection it may be appropriate to state some particulars of what this author has done, with some illustrations, and specifications of instances to illustrate it.

1. *He has stated the law correctly where others, both judges and text writers, have occasionally stated it incorrectly.*

Illustrations and Specifications.—The first book which Bishop

wrote was that on *Marriage and Divorce*, in one volume, since enlarged and published in two volumes.⁵ He was, of course,

⁵ Mr. Bishop gives the following as the manner in which the fifth edition has been prepared :

“ First. It contains a citation of the authorities which have appeared since the publication of the fourth edition.

“ Secondly. I have carefully read every word as it stood in the last edition, weighed anew every statement of the law, considered anew every form of expression, and made such alterations and corrections as seemed to be required.

“ Thirdly. I have added such new matter, and such new views of the old, as the accumulation of nine years, and my studies and experience in legal authorship during that time, have enabled me to do. These nine years have been particularly prolific in this department of the law, and the added matter is in amount not far from a fourth of a volume.

“ Fourthly. I have prefixed sub-heads to the sections, and made a few, but not many, new divisions of chapters. The numbering of the sections corresponds to that of the fourth edition.

“ Fifthly. The alphabetical index of subjects is considerably enlarged.”

The *United States Jurist* in commenting on this edition makes the following very correct observations: “The great popularity of this work is owing partly to the subject, which is an unusually interesting one, and still more to the fresh and vigorous manner of its treatment by the learned author, who first sent the work forth when a young man, and now ranks among the most famous and successful of text writers. We welcome this new edition of a very choice work, and anticipate a large demand upon the publishers from the professional public.

“ When a new edition of one of Mr. Bishop's works is announced, we always feel confident that this veteran writer has been his own editor ; that he has culled the latest cases for himself ; that he has read over the text of the previous edition of the work in question, and altered or added to it in the light of subsequent study and reflection ; in fine, that he has dealt honestly by his readers and sought to give them his very best. He carries, through a long period of steady work as a law author, perhaps more of the pride of authorship than any other man at the American bar ; and if others sometimes smile when Mr. Bishop puts the trumpet to his lips to sound his own praises, they do it pleasantly, and with the conviction that they would blow it right willingly for him, if he desired them to. Here is a man whose best years have been devoted to pen and study ; the instructor of the courts in Matrimonial and Criminal Law. Let him enjoy the full measure of his fame.

“ While we have sometimes thought Mr. Bishop too much inclined to favor lax divorce laws, as the panacea for lax morals, we have always

required to define *marriage*. Now, the word marriage has *two different meanings*; in the one sense, it denotes *the act of entering into the relation of husband and wife*; in the other sense, it signifies *the relation itself*. In the former sense, there is no dispute that marriage is a *contract*; because people are not forced into the matrimonial relation; two competent persons first contract together to be husband and wife. In the latter sense also, up to the time when Bishop wrote, every judge and text writer, whose utterances on the subject were given in the books, had defined marriage to be a *contract*. This definition, it is true, had been more or less qualified; some, indeed, had overloaded it with qualifying words, but all clung to the definition itself, that marriage was a *contract*. But Bishop very correctly denied that, in this latter sense, it was a *contract*, discarding entirely the old definition, and defined it as a *status*—neither more nor less. He conceded to it in this sense *one* element of a contract. And that was true, both in reason and adjudication. His book was pub-

read the present work with profit and pleasure; and we greatly admire that portion of it which is devoted to the law of marriage. Unlike Reeve and others of our former writers, who feared the Pope greatly, he set himself against the saying of the courts that marriage was a mere contract, and showed with great force why it should rather be regarded as a *status* or relation. To our thinking, he did much to bring professional men and the courts to a better understanding of the peculiar nature of that institution. And while his treatise on Marriage and Divorce was, as he calls it, an 'aggressive work,' when it first appeared—for Mr. Bishop has always assumed higher functions than those of a digest-maker—he finds it now an accepted authority in the courts, and valued no less for its accurate learning, than the sound thinking of its author.

"Comparing the present with the preceding edition we are glad to observe that Mr. Bishop profits by criticism and corrects faults as he grows older. Particularly do we rejoice to find him striking out silently the most offensive passages in that long criticism which he passed upon the English case of *Brook v. Brook*, decided upon what he believed to be untenable grounds, and yet by as respectable an authority as the English House of Lords. Intemperate expressions and coarse abuse of the judges can never help either advocate or law writer to overcome the courts which decided against him, nor create sympathy for his cause. Mr. Bishop mellows and gains dignity and composure of style as he advances in years, and his law books grow all the better for it."

lished in 1852; it has been widely read and commented upon and his definition has been in substance, or in words, universally adopted, not only in the United States, but in England also. It would sound strange now to hear a judge holding the old language; all admit, that, though there is such a thing as a marriage contract, yet, when the nuptial knot has been tied through a contract, the executed marriage is not a contract. And Bishop's particular definition has been not unfrequently commended. For example, in a Georgia case it was said that, "Perhaps the most accurate definition of marriage is found in Bishop on Marriage and Divorce."⁶

This altered definition is mentioned here merely as illustrating a principle on which Bishop's books are written throughout. A *definition* is, in legal literature, *a statement in brief of the law of the subject to which the definition relates*. The books are full of instances in which judges and text writers hold certain language which had dropped from some predecessor, while the actual *decisions* have been contrary to the *language*. In such a case, the *true law* is, not the *language*, but the *adjudications*; that is, the determinations of the courts on the facts in litigation. This is a proposition upon which there is no dispute among the authorities; all are agreed that it is so. Thence it follows, that a text book which employs the old language, at places where it is erroneous, is mischievous and misleading.

But how do we know that a particular expression of legal doctrine found in the books is erroneous? We compare it with the decisions. If the decisions, when *all* are taken into view, harmonize with the old utterance, then the old utterance is right; if they do not thus harmonize, then it is wrong. If we carefully read and meditate upon every decision pertaining to marriage, we will find that *whatever the judges said* while pronouncing their decisions, the *decisions themselves* were contrary to what they would be if marriage were really a *contract*,

⁶ *Askew v. Dupree*, 30 Georgia, 173, 176. And see for illustration of the altered way in which marriage is now spoken of by the courts, *Keerl v. Keerl*, 34 Md. 21; *Kinnier v. Kinnier*, 45 N. Y. 535; *Amory v. Amory*, 26 Wis. 152, 162; *Hyde v. Hyde*, Law Rep. 1 P. D. & M. 130.

and just what they should be if marriage was a *status*.

Therefore, the legal result is, that marriage is in law a *status*, and is not a *contract*; and all the language which it would be possible for all the judges to employ, could not make it otherwise, so long as their actual decisions remain what they are. This conclusion could only be reached by an examination of all the reported cases relating to marriage, including those necessary to be cited in a work of this character and those which have ceased to be of value.

A law book can only be really what is desired, when it cites as well the cases which support the text, as those which hold a different view, so long as the question may be regarded as an open one. This has been the invariable practice of Bishop, and it adds much to the perfection and value of his works.⁷

⁷ One of the most eminent jurists of this country, in referring to Bishop as a law writer says :

"Every sentence which our author writes shows that he is thoroughly master of his subject in its minutest details, that he has studied all that others have written upon it, and that all his own words are weighed and measured. Hear what he himself says in his preface to the fifth edition of the 'Marriage and Divorce : ' After stating that the new edition contained 'a citation of the authorities which have appeared since the publication of the fourth edition,' he adds : 'I have carefully read every word as it stood in the last edition, weighed anew every statement of the law, considered anew every form of expression, and made such alterations and corrections as seemed to be required.' Then he proceeds : 'I have added such new matter and such new views of the old, as the accumulations of nine years and my studies and experience in legal authorship have enabled me to do.' Labors such as these can never fail to produce valuable fruit, unless a writer is utterly incompetent for the tasks he undertakes. Such is not the case with Mr. Bishop. His mind is eminently juridical. He sees broad legal principles, and the subtlest distinctions and qualifications of doctrine, with equal precision, and states them with the greatest clearness and accuracy. His knowledge of the law is profound and critical. It is impossible to read his books without noticing the discriminating judgment with which he is constantly discussing and comparing the decisions and reasonings of judges. By this means he is many times enabled to show the unsoundness, not only of ideas thrown out by judges, but of the points decided. His remarkable power in this respect has sometimes caused judicial errors to be corrected and no doubt sometimes to be prevented."

He has in fact generally cited all the cases on disputed questions so far as they can be of any value, as well upon questions which may be regarded as settled as those not entirely so. This collection of authorities was essential to the completeness of his works.

But the feature which more than all others renders his books valuable is that, while presenting all views, all theories, all decisions material to know the history and existing state of the law, he has *stated the law on principle*, as deduced from its *reason* and *philosophy*, as the result of the *logic of the decided cases*.⁸

⁸ In doing this, Bishop has not escaped criticism. Thus, the *Chicago Bench and Bar* for April, 1873, in a notice of his "Statutory Crimes," says: "His writings on legal subjects are characterized by conciseness, clearness and abundant citation of authorities. While his books are not free from mannerisms, and while he *indulges in some instances in the presentation of theories confessedly not founded on adjudications, and open to criticism as thus wanting in the weight of authority*, there is in them a sufficiency of sound reasoning to entitle them to the respectful consideration which they have received."

Now it is plain that the words which I have here put in italics proceed from a misapprehension of the character of Bishop's books, or of the meaning of legal language. Without referring to statutes and other arbitrary forms of written law, there is nothing in the books of this author which he ever *confessed* to be, or which in fact was, "not founded on adjudications." Clearly, therefore, the writer in the *Bench and Bar* alluded to instances in which Bishop has stated rules of law as the result of *principle*. But no writer who understands himself ever meant that the doctrine which he was laying down "*on principle*" was "not founded on adjudications." The meaning is directly the reverse; namely, that it is *founded on adjudications*, most emphatically so; and not on *a single adjudication*, but on a line of adjudications sufficiently long to establish the *principle*; while on the other hand, a proposition may be said to be sustained by the adjudications, though they have not been so numerous and full as to establish a principle. Another distinction is, that we sometimes say a rule of law must be in a given form *on principle*, if the adjudications have not been of the *exact question*, but of questions necessarily leading to it. Hence in some instance *principle* may be one way and *adjudication* another, the meaning of which is, that the nearer and remote adjudications are in conflict. And if a writer does not, as Bishop has done, point out this conflict, he would not state the law "*on the authorities*" accurately.

A case may be supposed to illustrate this. Let it be supposed that a

And now I proceed to notice another feature of Bishop's works:

2. *He has placed the true doctrine of the law in such lights and accompanied it by such reason as to carry conviction to the*

man was sued for necessities furnished a woman alleged to be his wife, the defendant denying this allegation. Suppose the proven facts to have been, that the parties were duly married; but, a month after the marriage they agreed together to be no longer husband and wife, and the question for the court was, whether or not this post-nuptial agreement sundered the marriage. The court held that it did, the judge observing: "The question is, I am surprised to find, a novel one. I had supposed it to be settled that married parties could not dissolve their marriage by mutual consent. And I do find, on looking into the books, that they contain some such hints; but I have examined every reported case, English and American, and the result is that the question never was raised, and I must pronounce upon it for the first time. Still, the doctrine is plain, and it is contrary to the impressions of the community and to my first impression. Every reported case, and every text book, lays it down that marriage is a contract. And it is an established principle in the law of contracts, supported by every text book on the subject, and often adjudged and never contradicted in the courts, that the parties to a contract can mutually dissolve it at pleasure. They have dissolved this contract, and what they have done this court has no power to undo." What should a writer on the Law of Marriage, or of Husband and Wife, say of such a question? This was the only *authority* on the direct point, for counsel in subsequent cases had never dared to go back of this one adjudicated case to see if it rested on *principle*. Men like this reviewer in the *Bench and Bar* would have said a commentator, in stating the law, should lay it down "in the very words of the learned judge" and not "indulge in the presentation of theories *confessedly* not founded on *adjudications*."

But a really learned law writer of commentaries, who grasped the *reason* of the adjudications affecting marriage in all its results, would say that though this decision was not contradicted by any other to the direct point, it was still so contrary to legal *principle*, that it could not stand. Bishop has shown that, contrary to the universal *language* of the books, the "*adjudications*" proved marriage to be not a *contract*, but a *status*. This principle being established, it follows that the decision in question was wrong. And in evolving the principle that marriage is a *status*, not a contract, Bishop has placed the doctrine of marriage more accurately on the decisions than any of his predecessors had done.

Turning back, then, to the words of the reviewer, we see that Bishop is not open to the criticism he makes. On the contrary, his books *are* really echoes of the "*adjudications*" of the *principles* embodied in them.

legal mind; thus not only promoting truth but harmony also in the result of the judicial decisions.

Illustrations and Specifications.—In the preface to the first edition of the Law of Marriage and Divorce, in referring to

The eminent jurist referred to, in the last preceding note, in speaking of Bishop's *style*, says: "Our author's style is strongly marked, as that of every man of decided character must be. It is the natural expression of his ideas. Every sentence contains a clear and precise thought. Though he has firm convictions, he never aims to give the faintest false coloring, but always to show the exact state of the facts or the law with which he is dealing. His conscientious desire never to overstate or understate any thing, leads him occasionally to make long sentences, which a more careless writer might regard as ungraceful.

"The vigor and earnestness with which he never fails to write are quite remarkable. Every sentence is fresh and living. One cannot read his books without feeling that they come from a man who not only teaches with scrupulous fidelity the established doctrines of the law, but is at the same time a warm friend of justice and good morals.

"The following is a specimen of Mr. Bishop's freedom and zeal in discussion, taken from his comments on divorce from bed and board. I copy only a few lines, and they by no means do full justice to his treatment of the subject, which is rather too long to quote: 'The simple statement of the law itself is sufficient to satisfy any mind, not already perverted by false notions instilled into it in its hours of freedom from thought, that this law can only be evil in its influence, and evil continually. A man and woman, one of whom has conducted ill, and the other well in the matrimonial relation, are left by this divorce under all the burdens of marriage, yet forbidden to marry, and only permitted, if both choose to come together and form anew the relation of hate, already proved to be without the continuing element of love. And why is the innocent party thus burdened? Because somebody thinks—but let us not undertake to give reasons for what has no reason. If marriage is good for one innocent person, surely it is good for another. If marriage has a charm to hold back from vice one mind inclined to err, surely the interest of the community and private morals alike demand that every willing and erring person be brought under this charm?'—Marriage and Divorce, § 39.

"The steady earnestness of Mr. Bishop's manner acts upon the sympathy of his readers to such an extent that they often enjoy his discussions of most unpromising questions. He has another peculiarity of occasionally introducing metaphors, comparisons, and other ornaments, and playful sallies which a purist might object to as not in the best taste. For my own part, I regard these fancies very favorably, because they always enliven a dry subject, and sometimes serve like a discord

the many conflicts which then, more than now, existed in the adjudged law of the subject, it was said, that, in most instances of this sort, while one side of the controversy was necessarily right rather than the other, in the *result* to which the argument conducted, neither side had presented what seemed to be the better reasons, therefore on such questions the author had generally been compelled to walk in a somewhat untrodden way. And, he added: "Truth alone and unadorned, with no shadow of contiguous error upon its visage, is usually recognized alike by all men; and the principal reason why differences arise, is because it has never thus been distinctly and accurately seen." In a late edition of his work on Criminal Law, (vol. 1. 5th ed. §§ 94, 95,) he made a fuller statement of this matter, which it is unnecessary now to repeat.

in music. This is a specimen: 'A statute in Virginia declares marriage, where one of the parties is insane, void from the time they shall be so declared by a decree of divorce or nullity.' Our author shows that such marriages ought to be considered void from the beginning. In commenting on this statute he uses these words: 'All he can safely say is that young ladies of fortune in Virginia should beware how they become insane.' 1 Bish. Mar. & Div. §§ 90 *b.* 90 *c.* In another place he says, 'The minds of some judges have been draped in mist on this subject.' 1 Bish. Mar. & Div. § 95. Another example follows: 'Although the views of a law writer have, as such, no authoritative force before any court, yet the reason which either a law writer or an advocate presents, are, as reasons, just as binding upon the judges as are the reasons which a whole bench of judges put forth in deciding a cause, considered but as reasons. The decision is indeed authoritative law in the locality to which the tribunal pertains; but the reasons, as reasons, carry with them nowhere any force which they would not have if enunciated by the boy who black's the judge's boots.'

"There we have wholesome truth which bench and bar sometimes forget. The last words make us smile, but they clinch the idea, so that it will never start from the memory.

"I admire, as I have already intimated, Mr. Bishop's courage in attacking misguided legislation and erroneous decisions of courts. Yet it seems to me that sometimes, not often, his abundant *fortiter in re* makes him neglect that *suaviter in modo* which, in literary warfare, usually aids the assailant. But this fault, if it be one, is near akin to virtue.

"I do not like to end with fault finding, and therefore conclude with expressing my earnest desire that Mr. Bishop may live to enrich our juris-

I will state some instances by way of illustration. When the book on Marriage and Divorce was written, it was a disputed question whether, if one of the married parties was living in one state and the other in another, there could be any valid divorce between them. A plaintiff could not go into the state where the defendant resided, and there obtain a divorce, because, among other reasons, the states had all, or nearly all, provided by statute that the plaintiff in a divorce cause must be a resident; and generally it was required that the residence should have continued for a specified time. He could not bring the defendant into his own state, because no process of a state court can run into a sister state. Story had summed up the doctrine of the jurisdiction in divorce cases by saying:

“Upon the whole, the doctrine now firmly established in America upon the subject of divorce is, that the law of the actual *bona fide* domicil of the parties gives jurisdiction to the proper courts to decree a divorce for any cause allowed by the local law, without any reference to the law of the place of the original marriage, or the place where the offense for which the divorce is allowed was committed.” Conf. of Laws, § 230 *a*.

But it had been settled that husband and wife might have separate domicils for divorce purposes, and how it was where

prudence with more volumes equal to those which he has already published.”

The Hon. Stephen J. Field, associate justice of the Supreme Court of the United States, in writing May 13, 1873, of Bishop's books, said: “Few law treatises, certainly none produced in this country, are so frequently cited or more esteemed both by the bar and the bench.”

The Hon. John Erskine, judge of the United States District Court for the District of Georgia, writing September 23, 1872, of Bishop's Criminal Law says: “There is here and there in them also an Attic quaintness of expression that to me is very pleasant indeed. Take for instance this, which occurs in sec. 83, 5th chapt. 1st Vol. ‘Without * * * drawing from this hard subject, *with the flint of his own mind*, one spark of original light, or emitting one ray of legal genius!’

“Now, taking all I have quoted, it is as nice a piece of satire as, I venture to say, can be found. It is, too, of the true kind; it tickles (at least the looker-on) while it probes the wound.”

the domicil of one of the parties was in one state, and that of the other in another state, this eminent writer did not enlighten us. The judicial *dicta*, however, 'had been almost uniformly to the effect that, in such a case, there could, as a general thing, be no divorce which would be recognized as valid out of the state in which it was pronounced. Indeed, the reasoning had been patterned on that in the supposed case heretofore stated, conducting to the result that parties could divorce themselves at pleasure. Marriage, it was said, was a contract; consequently it would violate the first principles, alike of law and of natural justice, to hold a party bound by a decree dissolving his contract, rendered by a tribunal to which he was not personally amenable, to which he could not be summoned, and in which he did not appear. Drawing in a line with a mass of *dicta* to this effect, there was at least one direct adjudication, and those who do not distinguish nicely between *dicta* and adjudication claimed that there were many more. Opposed to all this on what Bishop deemed the right side, was *Harding v. Alden*, 9 Greenl. 140; but the reasoning, however worthy in itself, had failed to be convincing to the extent of stemming the adverse stream. Bishop adopted a course of reasoning entirely original with him, and which has satisfied every legal person who has examined it sufficiently to understand it. There are many persons, who have not thus carefully examined it, who think the whole doctrine erroneous in law and morals. But the current of decision has changed, and it is all now one way. The adverse adjudication just mentioned has been overruled in the very court in which it was pronounced, and the Supreme Court of the United States, and the courts of various states have adopted the doctrine announced by Bishop. And whenever the question has been reasoned out in any court, his line of argument has been pursued. One of the early cases which arose after his book was written, was the Rhode Island one of *Ditson v. Ditson*, 4 R. I. 87, and the opinion was delivered by the late Chief Justice Ames. He went into the investigation, doubtless with no prepossession in favor of the side which he espoused; but the opinion with which the investigation ter-

minated is an admirable reproduction of Bishop's argument, accompanied by due references to his book. It has ever since been regarded as the leading case on the subject. This matter is in some respects more minutely stated in 2 Marriage and Divorce (5th ed.) §§ 155, 170 c. And see the long note to § 163.

I might refer to various other instances in connection with the law of marriage and divorce; but, in general terms, to the current of judicial thought which this book opened, and, in considerable degree, to the very words in which the thought was expressed, the language of the courts has, as a general thing, ever since conformed. It has harmonized opinions; and the judicial law of our several states, which at the time Bishop first wrote was in great conflict, is now in as much harmony upon this subject as on any other. The instances are too many for separate specification.

Of Bishop's other books the only one which has been long enough before the profession to furnish many illustrations, is that on the Criminal Law, in two volumes. It would be impossible to go through every part of these volumes; but let us turn to a single chapter, that on the *Law of Attempt*. The subject cannot be said to have been discussed by any preceding text writer. Russell had some two or three pages on it, Archbold had a few disconnected paragraphs, and the American work by Wharton, the third edition of which was before the public when Bishop first wrote, and which as to the English law on all the subjects consisted mainly and to some extent, perhaps, necessarily of a reproduction of English text books, but with improvements in some respects, contained less than two pages. Bishop's discussion of the law of this topic in his first edition covered seventeen pages; and of the Pleading, Practice, and Evidence relating to it, twelve pages of the first edition of Criminal Procedure; making twenty-nine pages covered by this topic in the first edition of his works relating to criminal law and procedure. Turning now to the work on Criminal Law, we find among other illustrations under this head of Attempt, the following:

It is known that there are many crimes which a party may

commit when he does not *intend* to commit them, but has only a *general evil mind*, or a *purpose to do something else which is wrong*. Among them, for example, is murder, as defined at the common law. A large part of the murders are committed when the guilty person does not mean to take life. If, then, a person makes an assault, not meaning to take the life of the person assaulted, but intending some other evil consequence, yet when the circumstances are such that if the person dies the offence will be murder, is it an assault with intent to commit murder when the person assaulted does not die? Some courts had held that it is. Among them was the Supreme Court of Alabama. Said a learned judge in one case, "In order to make out the offence for which the defendant was indicted, it is necessary to show that the assault was made under such circumstances that, if the assault had resulted in the death of the party assaulted, it would have been murder."⁹ Therefore, when an assailant was so *drunk* as not to be capable of having any *intent*, he was still held to be guilty of an assault with intent to commit murder, in a case when, had the assailed person died, the offence would have been murder.¹⁰ But when Bishop's book appeared, this doctrine was reversed in the same tribunal; and it was held expressly on the strength of his discussion that general malice will not do in attempt, but that to make a man guilty he must in fact intend to commit the specific crime for the attempt to commit which he is indicted.¹¹ Consequently, it was afterwards held, contrary to the former decision, that, if a man is so drunk as to be unable to entertain the intent to take life, he cannot commit the crime of an assault with intent to murder, though he can commit the murder itself.¹² And it is believed that, in the other states,

⁹ Scitz v. The State, 23 Ala. 42, 43.

¹⁰ The State v. Bullock, 13 Ala. 413.

¹¹ Ogletree v. The State, 28 Ala. 693, 701.

¹² Mooney v. The State, 33 Ala. 419. This, of course, refers to murder at common law, where a specific intent to kill is not essential to constitute murder. But where this rule of the common law has been changed by statute requiring a purpose to kill, the rule stated in the text would not be applicable. This is sufficiently shown in Robbins v. State, 8

the doctrine which requires the specific intent in these cases, as laid down by Bishop, has nearly, perhaps quite, superseded the other view as general American law. Certainly the triumph of this doctrine where it was not before in the ascendant, is not limited to Alabama.

Again, in the Indiana case of *The State v. Swails*, 8 Ind. 524, on another branch of the law of attempt, a doctrine was laid down which Bishop declared to be unsound, adding his reasons. In the later case of *Kunkle v. The State*, 32 Ind. 220, the same court adopted and substantially copied in its opinion the views of Bishop and declined to follow the doctrine of the former case. There are doubtless other instances of the same sort; but it is unnecessary to multiply cases.

Much of what was originally laid down in the chapter could be placed only on *principle*; but it has been quite uniformly accepted by the courts as sound in law, and has often been quoted from and approved. I might speak of other similar matters throughout the book, and in the work on Criminal Procedure; and even in the work on the Law of Married Women, the last volume of which has only recently been published. But this is unnecessary. Bishop has been very generally, if not uniformly successful in so presenting the law on disputed questions, that those who have taken pains to understand his views have accepted them. And this is what by no means all of the judges have succeeded in doing in arguments embodied in judicial decisions; although decisions of the courts are often and, perhaps, generally more regarded and more carefully examined, than the expositions of the text writers. In fact, judges and practicing lawyers sometimes affect to despise all expositions of text writers, and to refuse to acknowledge that they have been influenced by them. An illustration of this may be given.

Ohio State. The writer of this article was the judge before whom that case was tried in the first instance. So far as the decision of the Supreme Court of Ohio in that case relates to murder by poisoning, it is clearly wrong. This has been shown by a review of it in the *Columbus Medical and Surgical Journal*.

The first edition of Bishop's Criminal Procedure, vol. 1, §§ 17, 18, criticized some Massachusetts cases. This was in 1866. In 1869 the same Massachusetts court in *Thayer v. Thayer*, 101 Mass. 111, adopted his view, and in effect overruled those cases, but made no reference to Bishop's book.¹³ But enough has been said on this head.

I proceed to state in brief another feature of Bishop's Commentaries.

3. He has evolved from the adjudicated cases and established very many legal doctrines, which do not appear to have occurred to the judges pronouncing the decisions, or to former authors.

This may be incidentally gathered from what has already been said, and from what will hereafter appear. A comparison of Bishop's books with those of authors who wrote prior to his publications, and with decisions of like date, will furnish abundant additional evidence of this. Somewhat intimately connected with this proposition, but still different from it in quality and degree, it is but simple justice to state of Bishop's several books, without disparaging the acknowledged merits and great learning and ability of other authors, and of judges, another proposition, as follows:

4. A large part of each of Bishop's books consists of legal doctrine derived from the adjudicated cases, which doctrine and which cases have never in any way been alluded to by any other author, English or American.

Proofs and illustrations as to the cases.—It is possible to note such as have been referred to by other authors, as compared with Bishop, and such as have not, and then to count them. As to the work on Marriage and Divorce, there can be no doubt, for a casual examination of it as compared with others on the same subject, will readily show the truth of the proposition stated. And the same is of course true of Bishop's last work, that on the law of Married Women, because there is no other American work on the same subject, and the bulk of the cases are American.¹⁴ Nor would the statement be questioned,

¹³ See, for this matter which was not retained in the 2nd Ed. of Crim. Proced., the work on Stat. Crimes, § 680 *et seq.* If instances of this sort were pleasant to contemplate, others might be added.

¹⁴ There is a quaint old English book, probably the first on the subject,

if it were important, as to the First Book of the Law.

As to the books pertaining to the criminal law, namely, Criminal Law, Criminal Procedure, and Statutory Crimes, the examinations and countings have been made. The books and citations used for the comparisons and examinations were :—

English.—Russell on Crimes, 4th Lond. Ed., in 3 vols, 1865 ; Archbold's Criminal Pleading and Evidence, in 1 vol., 17th Lond. Ed., 1871 ; Roscoe's Criminal Evidence, 8th Lond. Ed., 1 vol., 1874. These five volumes are all the English books on the subject, which, in England, are kept on sale by publishers. They constitute the body of the English text law.

American. — Wharton's Crim. Law, 7th Ed., 3 vols. ;¹⁵ Bishop's series of works in their last editions, namely, Statutory Crimes, 1st Ed. ; Criminal Procedure, 2nd Ed. ; Criminal Law, 5th Ed. The comparisons and countings are necessarily

the title of which is, *verbatim et literatim*, as follows: "The Lawe's Resolutions of Women's Rights ; or the Lawe's Provision for Women.—A Methodical Collection of such Statutes *and Customes*, with the Cases, Opinions, Arguments and Points of Learning in the Law, as doe properly concerne Women.—Together with a *compendious Table whereby the chiefe matters in this BOOKE contained, may be more readily found.* London. Printed by the assigns of John More, Esq., and to be sold by John Groove, at his Shop neere the Rowles, in Chancery Lane, over against the *Six-Clerks Office* 1632."

The author's name does not appear.

¹⁵ A Treatise on the Criminal Law of the United States ; By Francis Wharton, LL.D., in 3 vols , 7th Edition, Philadelphia, 1874. Vol. 1, Principles, Pleadings and Evidence. Vol. 2, Crimes. Vol. 3, Practice. The preface says the work covers "the whole field of criminal jurisprudence."

Wharton has also, "Precedents of Indictments and Pleas adapted to the use, both of the Courts of the United States and those of all the several States, together with notes on Criminal Pleading and Practice. By Francis Wharton, LL.D., 2d Edition, 2 vols., 1871." Also a work on the Law of Homicide. In comparing in the article to which this note is appended the number of cases in Bishop's series of books with those in Wharton, reference is only made to Wharton's Criminal Law in 3 vols., since it includes "Principles, Pleading, Evidence, Crimes and Practice," being subjects treated of by Bishop in his works on Criminal Law, Criminal Procedure and Statutory Crimes.

made, for the most part, from the several indexes of cases cited; and, as there may be errors in them, as well as in the references in the body of the books, the results cannot be in the strictest sense absolutely accurate; but they are the result of careful labor and counting, and as accurate as they could be made without a fresh verification of the cases by the original books of reports. There are inaccuracies in Wharton's book, both in the citations themselves in the body of it, and in the index of cases. There may be some in Bishop; but if so, comparatively few. The number of cases in Bishop's series, deducting all repetitions of cases referred to in more of the books than one, was found to be 15,006; of these 8,177 are not referred to in any of the other eight volumes of English and American text-law; against, of course, 6,829 which are referred to in one or more of those other works. It is perceived, therefore, that more than half of the cases cited by Bishop have never been referred to by any other text writer, English or American, in any of the works mentioned.

But the number of cases cited by an author does not necessarily determine the quantity of legal doctrine which he gives. Still it is an element to be taken into the account, and an important one; because all legal doctrine springs out of the adjudged law, or as a result of principle established by it, or from right reason. Certainly no writer on the criminal law, English or American, has attempted to lay down any great amount of legal doctrine, for the support of which he does not cite adjudged cases or their results in principle. If Bishop's books were compared merely with the English ones, no person would question the result; namely, that more than half the legal doctrine in them is such as is not found in the English books. The reason for this is two-fold: first, there is a great body of the older English law which is deemed to be superseded in England by statutes, and therefore is not given in the English text books, while still it is good law in our country, and ought to be found in an American book. Secondly, the American growth of the law is more than all the English, old and new, combined. As to the first of these

two propositions, a single illustration will show how the fact is. There is a book called "Fisher's Digest of the Criminal Law," published at San Francisco in 1871. It is prefaced by a note in which the writer says, "This volume is a full reprint from Mr. Fisher's Common Law Digest, of the titles Criminal Law and Criminal Information, and will be found a complete compendium of the English law of crimes and punishments, upon which our American criminal law is founded." The cases decided since Fisher wrote, it was also said, have been added from the tenth and eleventh volumes of Cox's Criminal Cases. Now, if we look into the English Fisher, we shall see that he professes to have *omitted the cases* which have become *obsolete* by reason of superseding statutes. But how much of the English criminal law has thus become obsolete? I do not know; but the quantity which is deemed to be thus *obsolete* there, yet not so with us, is sufficient to startle one who has not looked into the question. Bishop's series of books gives no English law which is *obsolete in this country*. Yet, while he has cited in them 4,425 English cases, 2,404, considerably more than half, are not in this American reprint of Fisher. It would seem, therefore, from this, if there were no qualifications of the inference to be derived from it, which I think there are, that over half of the English law of crimes, which is in force with us, is deemed to be superseded in England by statutes. *A fortiori*, therefore, when Bishop's several books contain also the American law, more than half of it must consist of doctrine not found in the English text books. Let us keep in our minds this mass of English law, not found in the English text books, because superseded by statutes in England, while yet it is living law with us. But the English text books seem not to have excluded it all, as Fisher has from his Digest, or seem to have drawn the line differently from what he has done. Of the 4,425 English cases cited by Bishop, there are 1,546 that are not referred to in the before-mentioned five volumes of English text law. Of these 1,546 cases, the second edition of Wharton's Criminal Law, which was the one current when Bishop first commenced his work, had but *twelve*. From this it would seem that he then could

have made at least no considerable examinations of the original English cases to which Bishop refers, but which are not referred to in this edition of Wharton, or if so, did not deem them material to carry out his purpose. It is by no means intended to disparage the valuable work of Wharton. He was a pioneer in American authorship on this subject, and rendered good service. His labors have been diversified and great. Bishop has pushed his researches, so far as we can judge from results, into wider fields, and so given the profession what it needed in a convenient form, both to state the law and to point out the sources which might be explored, to shed light and learning on the subjects discussed. Wharton has since enlarged and improved his work, and in his seventh edition he has 118 of the before-mentioned 1,546 cases cited by Bishop. Of Bishop's 15,006 cases, Wharton has 5,489, leaving 9,517 not cited. From this it would seem that Bishop has furnished a wider scope of investigation and a fuller statement of the English and American law in force in this country.

Wharton has displayed great research, and adopted a somewhat different plan from Bishop. Wharton has cited in all 9,174 cases, and these include considerably more than 3,000 cases which Bishop seems to have rejected as unnecessary or erroneous in principle. Wharton's plan has generally been to cite all the cases which he examined, though not all which existed, on every point, while Bishop seems to have rejected such as were deemed objectionable or unnecessary. Both plans, perhaps, have their advantages and disadvantages. Wharton's plan will enable the lawyer and judge to explore in detail the cases in a given locality, so far as cited, and to that extent trace the history of the adjudications on a particular enquiry. But it has, of course, a tendency to keep alive conflicting views, and leave unsettled that which should be settled, and sometimes leads to unnecessary prolixity of citation. It sometimes leaves the chaff with the wheat, and requires the labor of separating them. Some *principles* ought to be settled. An elementary treatise or commentary should rise to the dignity of announcing determined results, so far

as practicable, unincumbered by recognizing or referring to erroneous cases, which may repeat themselves. A commentary which does this, is, as has been justly observed, "better than a code: for this is the triumph of truth, while the code is merely the triumph of power."¹⁶

A code is necessarily arbitrary. It can not wisely foresee what mature reason may require. Hence, judicial determinations have generally more of logic and reason and justice than mere arbitrary codes. The law, as deduced from right reason, changes with circumstances. A code is unbending, and may hence become unreasonable and unjust.

A commentary which *merely* undertakes to *show the result of decided cases*, is very little better than a dull and unreasoning digest. But a book which, like those of Bishop, eliminates *the law* as founded on principle from adjudication and reason, must be more enduring than any code, and more instructive and valuable than any unreasoning statements which merely pile up the results of adjudication. It has been well said by Bishop, that "as the past never repeats itself, and every new case depends for its decision upon principles to be drawn from previous cases, where the facts were not, in all particulars, the same, a book for use in practice should present to the lawyers and judges who may consult it, not merely the dry cases of the past, but *the principles already deduced for practical use.*"¹⁷

This presents the idea and plan on which Bishop's works have been written. This necessarily rejects a mass of cases which could only introduce confusion and lead *away* from the law, rather than *to* it.

I might illustrate this by reference to books familiar to the profession. The early edition of Voorhies' New York Civil Code, with notes of decisions, cited *all* the adjudications upon each section. These were made by courts which differed widely, and the result was, the book, while valuable as a digest, did not eliminate and settle principles. The book was once cited to a judge, who remarked that it was "as con-

¹⁶ Bishop Crim. Law, § 94.

¹⁷ 1 Bishop Crim. Law, § 97.

clusive as a whirlwind." It was full of contradictory decisions. In this respect it was like a digest collecting *all* the decisions. On all such we might well inscribe,

"Nil fuit unquam,
Sic impar sibi."

But a commentary may well reject cases which have become *obsolete*, or are *overruled*, or *founded on wrong reasons*, even though reaching right conclusions. For all such cases, when introduced, are liable to unsettle the law or to mislead, unless, indeed, they are referred to as *no longer law*, and that can generally be of no utility.

In the original preface to Wharton's Criminal Law, which stood in every edition till the seventh, he made a statement which was tantamount to a profession of having cited all the cases other than those English ones which are not applicable in this country; and in the preface to the seventh edition he says, "This treatise now covers the whole field of criminal jurisprudence." Then, after speaking of illustrations which he has taken from the civil law, he adds, "I trust it will not be supposed that in making, as I constantly do in the following volumes, appeals to these authorities, I have in any way relaxed the vigilant scrutiny and careful analysis due to the adjudications of our own Anglo-American courts. So far from this being the case, I can now say that there is not a citation in my former texts which has not, for this edition, been verified; and that, *as far as I know*, there is not a *single intermediate reported English and American criminal decision* which I have not scrutinized and *introduced*." This extract has the word "*intermediate*," but plainly no special weight is to be given it, for the "*intermediate*" cases are not very much more fully collected than the rest. And still the fact remains that Bishop has introduced 15,006 *selected* cases, while Wharton has only taken 5489 of these, or a little over a third of the number in Bishop, leaving 9,517 not cited. Notwithstanding the great value of Wharton's work, it can not exhaust the doctrines of criminal law, and the authorities thereon in view of the many cases he has left uncited. It must also necessarily result that Bishop has filled many gaps of

legal doctrine, which it did not fall within the plan of other authors to fill. These must constitute a considerable portion of Bishop's works. From all this another proposition necessarily results, which it is proper to state.

5. *This added matter in Bishop's works, which is not to be found in any of the other text books mentioned, either English or American, is the most important of all.*

The reason will be at once perceived. The other matter can be readily turned to in the books already before the profession, but as to this which is added in Bishop, it can be found in none of the text books mentioned. And as Bishop has collected his material directly from the original reports, as well without the aid of the digests as with it, he has necessarily referred to very many cases which no lawyer can practically find in any other way than by consulting his works, or by going through the laborious and painstaking processes which this author did in preparing them, which is almost equivalent to withdrawing from practice to pursue the enquiry.¹⁸

In what has been said I have thus far referred mainly to the difficulties a law writer encounters, the characteristics generally of Bishop's volumes, the results he has accomplished, and the great service he has rendered to legal science and to good government. He has done a great work and done it admirably well. It must not be supposed that in thus speaking of Bishop I have forgotten the numerous other authors, both dead and living, who have on the same and other branches of law, displayed profound thought, research and ability. This country especially has been prolific of such, and particularly of late years. It would be a grateful task to examine the works of many of these and to commend them as they deserve. But I am not now writing of them. It would extend this article far too much to take up even Bishop's works separately and fully examine each.

6. *Bishop's First Book of the Law.*

¹⁸ 1st Criminal Law (5th Ed.) §§ 93-98, and in the prefaces to the several books.

One of these—"The First Book of the Law"—has generally received less notice than his other works, doubtless because it is not of so practical daily use to the lawyer and the judge as those. But its great value to the law student and the citizen desirous of knowing something of the sources and character of the laws under which he lives can not be overstated.¹⁹ In this country every citizen should know something of these. There are many books written "upon the plan of teaching a little law upon every legal topic," and some upon the plan of giving a full *outline* of it all. But Bishop's purpose is as he says: "First to enable all young persons to decide for themselves whether the law offers them the pursuit for life which is best adapted to their natural capacities and tastes. Second, to teach

¹⁹ There are numerous law books of this class, in some respects of much utility, and some of them of *great* value. Among them I may mention :

"Introduction to American Law, by Timothy Walker, late Professor of Law in the Cincinnati Law School."

"A Compend of Lectures on the Aim and Duties of the Profession of the Law, etc., by George Sharswood. Philadelphia. 1875 It is commonly called 'Sharswood's Professional Ethics.'"

"Analysis of American Law by Thomas W. Powell. Philadelphia, 1870."

"A Popular and Practical Introduction to Law Studies. By Samuel Warren, etc. Fifth American Edition. Edited by Wm. M. Scott, of the Albany bar. 1872."

"A Manual of Common Law, etc. By Josiah W. Smith, B. C. L., Q. C. American Edition. By Edward Chase Ingersoll of the Washington bar. 1871."

Wedgewood's Government and Laws.

"Elements of the Laws, etc. By Thomas L. Smith, late one of the judges of the Supreme Court of Indiana. 1853."

"A Manual for Law Students, exhibiting Courses for the Study of Conveyancing, Equity, and of Common Law, with questions on each course. From the London Edition. Harrisburg: McKinley & Lescure. 1845."

But none of these occupy the *same* ground as Bishop's First Book of the Law. Some, perhaps most of them, have been written "upon the plan of teaching a little law upon every legal topic." While this, as Bishop says, does not give a "perfected image of anything," it is really useful "to prepare the way for a thorough and profound study of the law." But Bishop's book has a totally different purpose.



all something concerning the nature of the law, how it has come to us, what is legal authority, and so on. Thirdly and chiefly, to teach the student of the law how to study it, and to furnish him with various incidental helps in the study." He adds the opinion very justly that this book will save to law students "months of hard mental labor" by finding in it what can only be incidentally gathered from scattered sources, after painful search and labor now rendered unnecessary. While these are the purposes of the book as expressed, he does nevertheless teach some law upon several subjects and tells us how to study more and where to find it. Among the most useful, perhaps, of all the effects of this book is that it will aid very many young men in deciding *that they should not make the law their profession or pursuit in life*. It is a lamentable fact that probably not one-half the young men who read law ever practice it as a profession for any considerable time. Many make a start and learn in shorter or longer periods of time that *they have mistaken their calling*. They have expended years of study, and of life, besides money, only to find at last that either they do not suit the profession, or it does not suit them. The purpose of life is defeated, and it may be difficult to reach, in some other business, that position which lost years properly applied would have given them. Of those who persevere in the profession, too many barely live, without even rising to the dignity of local distinction. The reason is, they *mistook their profession*. Bishop's chapters on "The Preparation necessary for Law Studies," if carefully examined, would have saved them the mistake. He has given valuable suggestions on "Physical Capacity," "Mental Aptitude," "Moral Aptitude," and "Preparatory Studies and Training."

He sums up all by saying that "he who, with no sort of preparatory mental discipline and study, enters a law school or law office to read law, undertakes a most difficult work under great disadvantages, and the chances are many to one *that he will fail*. That is drawing it moderately and mildly. His chances of success are so improbable that they can only be rendered possible by surpassing talent, energy and indus-

try. Even those who have preparatory mental discipline and study as well as all others, have been admonished by Horace in words ever to be remembered :

" Nil sine magno
Vita labore cedit mortalibus."

Or as William Wirt expressed it, " There is no excellence without great labor. It is the fiat of fate, from which no power of genius can absolve you."

He who chooses the law as a profession, to lead what is called " an easy life "—one free from great labor—has made a vast mistake. No man should study the law with a view to practice it, unless he is *fully conscious of more than ordinary talent*, and feels an *instinctive love of patient study and labor*, and *has an earnest desire* to endure it constantly, through the years of professional life.

Bishop has not sufficiently made all this manifest. But still he has done much to save men from the sacrifice of money and years of life, which ill-judged purposes and efforts to become lawyers, ending in failure, might otherwise entail. It is no favor to a young man not properly qualified, to encourage him to engage in any such efforts. It is a positive wrong. Bishop's book may become a benefactor to this class, which is a very large one. There is what is called " a legal mind." It is one with an aptitude or capacity to comprehend and grasp legal principles, and apply them to a given state of facts. We have been told that " poets are born, not made." This may not be exactly correct. But, after all, there is an *inherent capacity* capable of being developed by study, training and practice. And in this sense, one man may have " a legal mind," and another not. Some men have a capacity for mathematics, some for languages, some for natural philosophy, and so on. This seems to be the order of a wise Providence, designed for useful purposes. He who resolves and attempts to be a lawyer, when he cannot succeed, is guilty of the sin of attempting to violate this order. It is a sin—for sin is the transgression of the law—and it is one which carries with it a terrible penalty, the penalty of failure and disappointment. Let those who contemplate the

study of the law pause and reflect well before they embark on its uncertain pathway to success. Without a "legal mind" there can be no great success. This requires the *natural capacity*, and its culture and development by training and study. A "legal mind" is one so versed in legal principles as to readily comprehend them. It is essential to a "legal mind" that it can comprehend the difference between *legal principles* and *other principles*. Bishop very properly says in the preface to his work on Married Women: "When an author says that such or such is the 'doctrine in reason' or in 'principle,' he has no sort of reference to what would be the reasoning or the conclusion of an able and well-balanced intellect, uneducated in the law. Neither does he mean to admit that the doctrine is even just in natural reason, or such as should be approved in legislation. The 'principle' and 'reasons' of the law are sometimes learned by a course of direct searching after them. But the greater part of them come to the lawyer as the language comes to our children."

It might be inferred from this that legal principles are not based on sound morals or religion. But this, as a general rule, would be an unjust inference. For legal principles are founded in good morals. But they rest on reasons of expediency and moral right, in view of the circumstances and condition of society. They operate justly, too, because men deal with each other in view of these principles; and so they operate without deception or fraud. There may be different systems of morals, each right on a given theory. Thus, if one man sells another a given article of merchandise, believing it sound and valuable, in the exercise of ordinary care, but which turns out unsound and hence of no value, a writer on religion or ethical morals *might* say the purchaser in such case, who receives no value, should not be required to pay the full, usual and contract price. And this is the theory and doctrine of what is called the *Civil Law*. When men contract in view of such rule, the seller must suffer the loss. But the common law in such case requires the purchaser to pay full price. As the seller is guilty of no fraud, he has done no intentional wrong. To hold that he should not recover would

so interfere with trade and commerce that the injury produced by the rule would be less than those resulting from a different one. To allow such objection to payment to prevail, would result in lawsuits so numerous that society would have but little repose. The rule of the common law rests on good morals.

Now the "legal mind" can grasp all this and similar questions, almost as if by intuition. But as the reason of this rule of the common law does not apply to the fabricator of a useless machine, he, as a general rule, cannot recover for such. His employment is on the expectation that he will exercise the reasonable skill of his vocation. But if he makes to order, upon a required plan, a machine, then he can recover the value of the labor and materials, without regard to its utility. In such case he only does what he is employed to do. The employer assumes the risk of the plan. The legal mind can grasp the reasons for these and similar rules.

7. *Bishop on the Law of Married Women*.—Bishop's last work is that on the Law of Married Women. The first volume is mainly devoted to an elucidation of the elementary principles which governed the American Law of Married Women before the enactment of recent statutes. It may be called the pioneer American work on the subject, and, like all of Bishop's writings, it is learned and valuable. The second volume is largely devoted to a consideration of the statutes of the several states affecting the rights of married women, commencing about 1848—the decisions under them, and the effect of all upon prior common law principles. It would scarcely be possible, within any reasonable space, to prepare a volume giving all the statutes, all the decisions and all the results. This volume does not attempt it. In this respect it is necessarily imperfect. While its value is to be commended, it is nevertheless desirable that it be enlarged and improved. But Bishop has been able to correct errors in the courts, both in failing to apply statutes and in misapplying them. An example of the first allegation may be found in vol. 2, section 336, in which it is said:

"In Massachusetts, in 1856, a promissory note was given

by a man to a woman and *soon after* in the same year they intermarried. And the court held, in 1870, that the note became by reason of the marriage a nullity. *Abbott v. Winchester*, 105 Mass. 115. If we would determine whether this decision was a just exposition of this law or not, we are compelled to look *for the law* into a statute not referred to in the report of the case. In 1855, *the year before the marriage*, it was enacted that 'the property, both real and personal, which any woman, who may hereafter be married in this commonwealth, may own at the time of her marriage, and the rents, issues, proceeds, and profits thereof, shall remain her sole and separate property notwithstanding the marriage.' Now, this note was property which this woman owned at the time of her marriage; the statute in express terms declared that it should 'remain her sole and separate property notwithstanding her marriage;' but the court said that by the marriage 'the note became a mere nullity.' Here the learned court not adverting to the statute, pronounced a decision, *word for word*, contrary to the direct command of the legislature."

It would add to a correct understanding to say, as Bishop has not, that the action was at law against the administrator of the husband deceased. It might be said the relation of husband and wife on common law principles extinguished the debt and the statute did not affect that principle. The force of this might depend somewhat on the rule of construction to be applied to the statute.²⁰

But the *purpose* of the statute is so clear that the claim made for its effect by Bishop would seem to be the true one.²¹

This extract will serve another purpose. There are two extremes which a law book should avoid in stating principles. It should not express them in words so *few* as to be *obscure*, or so many as to be useless or prolix. The words put in *italics* in the foregoing extract are of this latter or unnecessary character. They are not so manifestly so as to be seriously objectionable; but still the extract would be more con-

²⁰ 2 Bishop, § 17.

²¹ *Russ v. George*, 45 N. H. 467; *Wood v. Warden*, 20 Ohio, 518.

cise, and equally forcible, or, at least, sufficiently so, without them. The language might otherwise be a little condensed. And this criticism may be fairly made, to a *very limited extent*, as to some portions of each of Bishop's books. But it is safer to err on the side of making statements clear and forcible by sufficient words, rather than leaving them obscure for the want of them.

A book which is to be read, quoted, and from which extracts are to be copied for generations, by multitudes of men, should not impose any absolutely unnecessary labor on them.

A writer of commentaries should, as Bishop has very well done, fill the measure of the poet's description:

" Though deep, yet clear ; though gentle, yet not dull ;
Strong, without rage ; without o'erflowing, full."

This article might suffer under a less severe criticism than that just suggested. But a larger profusion of words is allowable in a review, than in a grave treatise, and the merits of this article in respect of its verbiage are less important than those of such a work.

Bishop would render a great service to the profession, and to legal science, if he would furnish a work on courts martial and other military tribunals, embracing the constitutional and statutory law and common military law applicable to them; the cases in this and other countries which these courts have given us; their jurisdiction and powers; the pleading, practice, evidence and forms, in use therein; the relations existing between judicial and military tribunals, and whatever besides might illustrate the subject. To this should be added a work on penal-military and martial law. There is no one work which fully covers these grounds. The last fifteen years have furnished much material for such works; but it is scattered, and needs to be reduced to form and system. To this might be added, precedents of indictments, pleadings and all forms for practice, besides the law of criminal pleading and evidence. There would be an advantage in having each subject treated *separately* and by the same author, even though his previous works covered nearly all of the same ground.

A similar work on the Law of Impeachable Crimes,²² and another on the Law of Contempts in the judicial courts, in military courts, and in legislative bodies, would help much to complete a system of law covering the whole field of punitive justice. But it would indeed be a vast labor, requiring the energies of a long life, the industrious application of its whole period, and a legal talent of the highest order. If any man ever does it, and does it as well as Bishop has done his work, he might well append to its "*finis*" what indeed Bishop might already add to his: "*Exegi monumentum.*"

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²² On this subject see an article on "The Law of Impeachment," by Wm. Lawrence of Ohio, in the 6th vol. of American Law Register, 641 (old series vol. 15, Sept. No. 1867). On the trial of President Johnson, before the Senate of the United States, in March, 1868, General B. F. Butler in his opening argument laid this before the Senate with these remarks: "I pray leave to lay before you at the close of my argument, a brief of all the precedents and authorities upon this subject in both countries for which I am indebted to the exhaustive and learned labors of my friend Hon. William Lawrence, of Ohio, member of the Judiciary Committee of the House of Representatives, in which I fully concur and which I adopt." Congressional Globe, vol. 70, supplement, 2d session 40th Congress. The same trial is published in one volume by F. & J. Rives in which the same article appears at page 82, with additions perhaps of some value, commencing on page 47 of the appendix.

IV.—THE CASES IN WHICH THE MASTER IS LIABLE FOR INJURIES TO SERVANTS IN HIS EMPLOY.

The frequency with which questions arise, and become the subject of legal controversy, concerning the liability of an employer to persons receiving injuries in his service, must be the excuse for the present paper. The legal questions have recently received the attention of many able jurists, and several of the difficulties which surrounded the general subject but a few years ago may now be considered permanently removed. The purpose here will be, to present the general rules which have been laid down by the authorities, with some of the reasons on which they are based.

I. It is now conceded that, in general, the master is not liable to his servant for any injury which the latter, while engaged in the service of the former, may receive from any of the risks incident to it.

For this exemption the reason commonly assigned is, that the servant, in entering into the employment, must be deemed to contemplate all the risks incident to it, and both he and his employer must be supposed to have those risks in view when negotiating for the employment and agreeing upon the compensation. As the servant knows when he engages in the service that he will be exposed to the incidental risk, "he must be supposed to have contracted that, as between himself and the master, he would run this risk." ¹

Another and perhaps not less forcible reason, though not so often assigned, is that on grounds of general public policy the opposite doctrine would be unwise, not only because it would subject employers to unreasonable, and often ruinous responsibilities, but also because it "would be an encouragement to the servant to omit that diligence and caution which

¹ Alderson, B., in *Hutchinson v. Railway Co.*, 5 Exch. 343,351.

he is in duty bound to exercise on behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against the master for damages could possibly afford."² In many employments also, the public are compelled to rely upon the caution and diligence of servants as the chief protection against accidents which may prove destructive of life or limb; and any rule of law which would give the servant a remedy against the master for any injury resulting to himself from such an accident, instead of compelling him to rely for his protection upon his own vigilance, must necessarily tend in the direction of an abatement of his vigilance, and in the same degree to increase the hazards to others. The case of carriers of persons is the most common and most forcible illustration of this remark. It is of the highest importance in that employment that every one who has a duty or service to perform upon which the safety of others may depend, whether in the capacity of master or servant, should be under all reasonable inducements to discharge or perform it with fidelity and prudence, and that no one should be tempted to imperfect vigilance by any promise the law might make to compensate him for injuries against which his own caution might, perhaps, have protected not himself alone, but others also. The inducement to vigilance is sufficiently furnished, in the case of the master, by compelling him to respond to third persons for all injuries, whether caused by his own negligence or by that of his servants; but in the case of servants it is supplied mainly by this rule, which, by denying him the remedy that is allowed to third persons, makes it his special interest to protect others; since it is only in doing so that he protects himself.

II. The rule which exempts the master from responsibility for injuries to his servants, extends to cases where the injury results from the negligence of other servants in the

² Abinger, C. B., in *Priestly v. Fowler*, 3 M. & W. 1, 6.

same employment. This general rule is now conceded on all hands.³ The disputes which remain concern its proper limits, and what and how many are the exceptional cases. In some quarters a strong disposition has been manifested to hold the rule not applicable to the case of a servant who, at the time of the injury, was under the general direction and control of another, who was entrusted with duties of a higher grade, and from whose negligence the injury resulted.⁴ But it cannot be disputed that the negligence of a servant of one grade is as much one of the risks of the business as the negligence of a servant of any other; and it seems impossible, therefore, to hold that the servant contracts to run the risks of negligent acts or omissions on the part of one class of servants and not those of another class. Nor on grounds of public policy could the distinction be admitted, whether we consider the consequences to the parties to the relation exclusively, or those which affect the public who, in their dealings with the employer, may be subjected to risks. Sound policy seems to require that the law should make it for the interest of the servant that he should take care not only that he be not himself negligent, but also that any negligence of

³ *Bartonskill Coal Co. v. Reid*, 3 Macq. H. L., p. 266; same v. McGuire. Id. 300; *Hutchinson v. Railway Co.*, 5 Exch. 343; *Morgan v. Railway Co.*, L. R. 1 Q. B. 149; *Brown v. Cotton Co.*, 3 H. & N. 511; *Murray v. Railroad Co.*, 1 McMul. 385; *Farwell v. Boston etc., R. R. Co.*, 4 Met. 49; *Caldwell v. Brown*, 53 Penn. St. 453; *Sullivan v. Railroad Co.*, 11 Iowa, 421; *Harper v. Indianapolis, etc., R. R. Co.*, 47 Mo. 567; *Davis v. Detroit, etc., R. R. Co.*, 20 Mich. 105; *Lawler v. Androscoggin R. R. Co.*, 62 Me. 463; *Sherman v. Rochester, etc., R. R. Co.*, 17 N. Y. 153; *Illinois Central R. R. Co. v. Cox*, 21 Ill. 20; *Hard v. Vermont, etc., R. R. Co.*, 32 Vt. 473; *Wonder v. Baltimore, etc., R. R. Co.*, 32 Md. 411; *Columbus, etc., R. R. Co. v. Arnold*, 31 Ind. 174; *Hayden v. Smithville Manf. Co.*, 29 Conn. 557.

⁴ *Little Miami R. R. Co. v. Stevens*, 20 Ohio, 415; *Cleveland, etc., R. R. Co. v. Keary*, 3 Ohio N. S. 201. See these cases explained in *Pittsburg, etc., R. R. Co. v. Devinney*, 17 Ohio N. S. 197. See also *Louisville, etc., R. R. Co. v. Collins*, 2 Duv. 114; same v. *Robinson*, 4 Bush, 507. If the master himself works with his servants and injures one of them by his negligence, he is liable therefor, and if he has partners in the business, they are liable also. *Ashworth v. Stanwix*, 3 Ellis & Ellis, 701. See *Mellors v. Shaw*, 1 Best & Smith, 437.

others in the same employment be properly guarded against by him, so far as he may find it reasonably practicable, and be reported to his employer, if needful. And in this regard it can make little difference what is the grade of servant who is found to be negligent, except as superior authority may render the negligence more dangerous, and consequently increase at least the moral responsibility of any other servant who, being aware of the negligence, should fail to report it.⁵

It has also been sometimes insisted that the law should exclude from the scope of the general rule the case of a servant injured by the negligence of another who, though employed in the same general business, had his service in some distinct branch of it; as in the case of a laborer on the track of a railroad injured by the carelessness of a conductor; a carpenter employed on buildings injured by the negligence of a yard-master in making up trains; and the like. But in the main the authorities agree that the general rule must apply to such cases, and that, on the reasons on which the rule is rested, they cannot be distinguished from those in which the service of both persons was in the same line.⁶

⁵ "A foreman is a servant, as much as any other servant whose work he superintends." Willes, J., in *Gallagher v. Pifer*, 16 C. B. N. S. 659, 694. The same doctrine was declared in *Wigmore v. Jay*, 5 Exch. 354, and *Feltham v. England*, L. R. 2 Q. B. 33. In this country it has often been declared that the grade of service of the two servants is unimportant "provided the services of each in his particular sphere and department are directed to the accomplishment of the same general end." Bacon, J., in *Warner v. Erie R. R. Co.*, 39 N. Y. 468, 470. See *Coon v. Syracuse etc. R. R. Co.*, 5 N. Y. 492; *Chicago etc. R. R. Co. v. Murphy*, 53 Ill. 336; *Columbus etc. R. R. Co. v. Arnold*, 31 Ind. 174; *Hayes v. Western R. R. Corp.* 3 Cush. 270; *Hard v. Vermont, etc. R. R. Co.*, 32 Vt. 473; *O'Connell v. B. & O R. R. Co.*, 20 Md. 212; *Sherman v. Rochester, etc., R. R. Co.*, 17 N. Y., 153; *Ryan v. Cumberland, etc., R. R. Co.*, 23 Penn. St. 384; *Chicago, etc., R. R. Co. v. Keefe*, 47 Ill. 108; *Pittsburgh, etc., R. R. Co. v. Devinney*, 17 Ohio N. S. 157. "No member of an establishment can maintain an action against the master for an injury done to him by another member of that establishment, in respect of which, if it had been a stranger, he might have had a right of action." Pollock, C. B., in *Abraham v. Reynolds*, 5 H. & N. 143.

⁶ It was held in *Morgan v. Railway Co.*, L. R. 1 Q. B. 149, that a railway company was not liable to a carpenter employed to work at its ~~work~~

It has also been decided in England that the master is not liable for an injury caused by the negligence of one of his servants to the servant of a sub-contractor, who is engaged in the performance of a part of the same work. If the two servants were at the time engaged in doing the common work of the employer, they must be considered as for this purpose the servants of such employer while doing his work, "each directing and limiting his attention to the particular work necessary to the completion of the whole work," notwithstanding the one was employed by and responsible to the employer directly, and the other to one employed by him.⁷

III. The exceptions to the general rule may perhaps be all embraced in one general proposition: That if the servant is injured in consequence of the personal negligence of the

on its line, who was injured by the negligence of its porters in shifting an engine on its turn-table close by the shed on which the carpenter was working. "The plaintiff and the porters were engaged in one common employment, and were doing work for the common object of their masters, viz., fitting the line for traffic." Earl, Ch. J., p. 154. "If a carpenter's employment is to be distinguished from that of porters employed by the same company, it will be sought to split up the employees in every large establishment into different departments of service, although the common object of their service, however different, is but the furtherance of the business of the master; yet it might be said with truth that no two had a common immediate object." Pollock, C. B., p. 155. And see *Feltham v. England*, L. R. 2 Q. B. 33. It is held in Massachusetts that a railroad company is not responsible to a person employed by it to repair its cars, for a personal injury arising from the negligence of a switchman, in failing properly to adjust a switch on the track over which he is carried by the company to his place of work, unless negligence in the employment of the switchman is made out. *Gilman v. Eastern R. R. Corp.* 10 Allen, 233. In *Albro v. Agawam Canal Co.*, 6 Cush. 75, it was decided that a manufacturing company was not liable to one of its operatives for an injury occasioned by the negligence of the superintendent. And see *Columbus etc. R. R. Co. v. Arnold*, 31 Ind. 174; *Louisville etc. R. R. Co. v. Cavens*, 9 Bush, 559; *Weger v. Pennsylvania R. R. Co.*, 55 Penn. St. 460. The rule of exemption extends to "every member of an establishment." Pollock C. B., in *Abraham v. Reynolds*, 5 H. & N. 143.

⁷ *Wiggett v. Fox*, 36 E. L. & Eq. 486; s. c. 11 Exch. 832. Compare *Murray v. Currie*, L. R. 6 C. P. 24; *Forsythe v. Hooper*, 11 Allen, 419; *Burke v. Norwich etc. R. R. Co.*, 34 Conn. 474; *Hunt v. Pennsylvania R. R. Co.*, 57 Penn. St. 475.

master himself, the latter is responsible for the injury, on the same general grounds and for the same reasons which would render him liable for a like negligent injury to a stranger.

In considering this proposition, it may be remarked:

1. That the master's negligence may consist in subjecting the servant to the dangers of unsafe buildings or machinery, or to other perils on his own premises, which the servant neither knew of nor had reason to anticipate or to provide against when he entered the employment, or subsequently.

The general rule is, that while the owner of real estate is not bound to provide safeguards for wrong-doers, he is bound to take care that those who come upon his premises by his express or implied invitation be protected against injury resulting from the unsafe condition of the premises, or from other perils, the existence of which the invited party had no reason to look for. Thus, a railroad company has been held liable to one who was invited by a signal from its flagman to cross its track, on the supposition that it was clear, and was injured while so doing by a passing train.⁸ So a brewer was held liable to a customer who came to do business with him, and fell through an unguarded trap door.⁹

The invitation to a servant to come upon dangerous premises without apprising him of the danger is just as culpable, and an injury resulting from it is just as deserving of compensation in the case of a servant as in any other case. Moreover, no reason of public policy and none to be deduced from the contract of the parties, can be suggested, which should relieve the culpable master from responsibility. A man cannot be understood as contracting to take upon himself risks which he neither knows or suspects, nor has reason to look for; and it would be more reasonable to imply a contract on the part of the master not to invite the servant into unknown dangers, than one on the part of the servant to run the risk of them. But the question of contract

⁸ *Sweeny v. Old Colony etc. R. R. Co.*, 10 Allen, 368. See *Elliott v. Pray*, Id. 378.

⁹ *Chapman v. Rothwell*, El. Bl. & El. 168. See also *Freer v. Cameron*, 4 Rich. 228.

may be put entirely aside from the case, and the responsibility of the master may be planted on the same ground which would render him responsible if the relation had not existed. Whether invited upon his premises by the contract of service, or by the calls of business, or by direct request, is immaterial; the party extending the invitation owes a duty to the party accepting it, to see that at least ordinary care and prudence is exercised to protect him against dangers not within his knowledge, and not open to observation. It is a rule of justice and right which compels the master to respond for a failure to exercise this care and prudence.¹⁰

The terms in which the proposition has been stated will exempt the master from responsibility in all cases where the risks were apparent, and were voluntarily assumed by a person capable of understanding and appreciating them. No employer, by any implied contract, undertakes that his buildings are safe beyond a contingency, or even that they are as safe as those of his neighbors, or that accidents shall not result to those in his service from risks which perhaps others would guard against more effectually than it is done by him.

¹⁰ *Marshall v. Stewart*, 2 Macq. H. L. 20; S. C. 33 Eng. L. & Eq. 1; *Indermaur v. Dames*, L. R. 2 C. P. 311; *Ryan v. Fowler*, 24 N. Y. 410; *Strahlendorf v. Rosenthal*, 30 Wis. 674; *Perry v. Marsh*, 25 Ala. 659; *Schooner Norway v. Jenson*, 52 Ill. 373; *Walsh v. Peet Valve Co.*, 110 Mass. 23; *Holmes v. Northeastern Railway Co.*, Law R. 4 Exch. 254; s. c. affirmed, L. R. 6 Exch. 123; *Mellers v. Shaw*, 1 Best & Smith, 437.

The rule has been applied against railroad companies, in the case of injuries to their servants in consequence of the road-bed being out of repair. See *Snow v. Housatonic R. R. Co.*, 8 Allen, 441. "There is no rule better settled than this: that it is the duty of railroad companies to keep their roads and works, and all portions of the track, in such repair, and so watched and tended, as to insure the safety of all who may lawfully be upon them, whether passengers, or servants or others. They are bound to furnish a safe road, and sufficient and safe machinery and cars." Breese, Ch. J., in *Chicago etc. R. R. Co. v. Swett*, 45 Ill. 197, 203. But a railroad company is not liable to one of its employees for an injury occasioned by a latent defect in one of its bridges, where the company employed competent persons to supervise and inspect the bridge, by whom the defect was not discovered. *Warner v. Erie Railway Co.*, 39 N. Y. 468.

Neither can a duty rest upon any one which can bind him to so extensive a responsibility. There are degrees of safety in buildings which differ in age, construction, and state of repair, as there are also in the different methods of conducting business; and these, not the servant only, but any person doing business with the proprietor, is supposed to inform himself about and keep in mind when he enters upon the premises. Negligence does not consist in not putting one's buildings or machinery in the safest possible condition, or in not conducting one's business in the safest way; but there is negligence in not exercising ordinary care that the buildings and machinery, such as they are, shall not cause injury, and that the business as conducted shall not inflict damage upon those who themselves are guilty of no neglect of prudence.

The principle is well stated by the Supreme Court of Connecticut in a case where the injury the servant complained of was caused by his coming accidentally in contact with machinery which, it was claimed, ought to have been covered so as to protect against such an accident. "The employee here was acquainted with the hazards of the business in which he was engaged, and with the kind of machinery made use of in carrying on the business. He must be held to have understood the ordinary hazards attending his employment, and therefore to have voluntarily taken upon himself this hazard when he entered into the defendant's service. Every manufacturer has a right to choose the machinery to be used in his business, and to control that business in the manner most agreeable to himself, provided he does not thereby violate the law of the land. He may select his appliances, and run his mill with old or new machinery, just as he may ride in an old or new carriage, navigate an old or new vessel, occupy an old or new house, as he pleases. The employee having knowledge of the circumstances on entering his service for the stipulated reward, cannot complain of the peculiar taste and habits of his employer, nor sue him for damages sustained in and resulting from that peculiar service."¹¹

¹¹ *Hayden v. Smithville Manf. Co*, 29 Conn. 548 558, per Ellsworth J., who in citing authorities refers among others to what is said by Bramwell

2. The master may also be guilty of actionable negligence in exposing persons to perils in his service which, though open to observation, they by reason of their youth or inexperience do not fully understand and appreciate, and are injured in consequence. Such cases occur most frequently in the employment of infants. It has been repeatedly held that the case of an infant is no exception to the general rule which exempts the master from responsibility for injuries arising from the hazards of his service.¹² But while this is unquestionably true as a rule, it would be gross injustice, not to say absurdity, to apply in the case of infants the same tests of the master's culpable negligence which are applied in the case of persons of maturity and experience. It may be ordinary caution in one case to apprise the servant of the danger he must guard against, while in the case of another, not yet beyond the years of thoughtless childhood, it would be gross and most culpable, if not criminal carelessness for the master to content himself with pointing out dangers which were not likely to be appreciated, or if appreciated, not likely to be kept with sufficient distinctness and caution in mind, and against which, therefore, effectual protections ought to be provided. The duty of the employer to take

B. in *Williams v. Clough*, 3 H. & N. 258, 260. See also *Priestley v. Fowler*, 3 M. & W. 1; *Dynen v. Leach*, 26 L. J. Exch. 221; S. C. 40 Eng. L. & Eq. 491; *Seymour v. Maddox*, 16 Q. B. 326. This last case was thought by the Court of Appeals of New York to have gone too far. See *Rynan v. Fowler*, 24 N. Y. 410. A railway company is not bound to change its machinery in order to apply every new improvement, or supposed improvement, in appliances; and an employee who consents to operate the machinery already provided by the company, knowing its defects, does so at his own risk. *Wonder v. B. & O. R. R. Co.*, 32 Md. 411. The case of *Combs v. New Bedford Cordage Co.*, 102 Mass. 572, was very similar in many respects to that of *Hayden v. Smithville Manf. Co.* *supra*, and the same general principle was laid down. The failure to employ sufficient assistance does not render the employer liable to a servant who, knowing the facts, had continued in the business without objection. *Skip v. Eastern Counties R. R. Co.*, 9 Exch. 223; S. C. 24 Eng. L. & Eq. 396.

¹² *King v. Boston etc. R. R. Co.*, 9 Cush. 112; *Gartland v. Toledo etc. R. R. Co.*, 67 Ill. 498. See a hard case in *Murphy v. Smith*, 19 C. B. N. S. 361.

special precautions in such cases, has sometimes been very emphatically asserted by the courts.¹³ The Supreme Court of Massachusetts has very properly said, in a case in which defendants relied for their protection upon a notice of danger which they had given to the party injured: "The notice which the defendants were bound to give the plaintiff of the nature of the risks incident to the service which he undertook, must be such as to enable a person of his youth and inexperience in the business intelligently to appreciate the nature of the danger attending its performance. The question, indeed, on this branch of the case is not of due care on the part of the plaintiff, but whether the cause of the injury was one of which, by reason of his incapacity to understand and appreciate its dangerous character, or the neglect of the defendants to take due precautions to effectually inform him thereof, the defendants were bound to indemnify him against the consequences. But in determining this question it is proper and necessary to take into consideration, not only the plaintiff's youth and inexperience, but also the nature of the service which he was to perform, and the degree to which his attention, while at work, would need to be devoted to its performance. The obligation of the defendants would not necessarily be discharged by merely informing the boy that the employment itself, or a particular place or machine in the building or room in which he was set to work, was dangerous. Mere representation in advance that the service generally, or a particular thing connected with it, was dangerous, might give him no adequate notice or understanding of the kind and degree of the danger which would necessarily attend the actual performance of his work."¹⁴ This is not a rule which in

¹³ *Guzzle v. Frost*, 3 Fost. & Finl. 622; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572. In *Bartonskill Coal Co. v. McGuire*, 3 Macq. 300, 311, Lord Chelmsford, in speaking of an injury to a young girl from exposure to machinery in the building where she was employed, says: "It might well be considered that, by employing such a helpless and ignorant child, the master contracted to keep her out of harm's way in assigning to her any work to be performed."

¹⁴ Gray J., in *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 596. A similar requirement of extra caution and care in the case of

its application is confined exclusively to infants: the principle is a general one, which requires good faith and reasonable prudence on the part of the employer, under the special circumstances of the particular case; of which infancy, if it exists, may be a very important one, but possibly not more so than some others.

3. The master may also be negligent in commanding the servant to go into exceptionally dangerous places, or to subject himself to risks which, though he may be aware of the danger, are not such as he had reason to expect, or to consider as being within the employment.

It has been often—and very justly—remarked, that a man may decline any exceptionally dangerous employment, but if he voluntarily engages in it he should not complain because it is dangerous.¹⁵ Nevertheless, where one has entered upon the employment and assumed the incidental risks, it is not reasonable to hold, that other risks which he is directed by the master to assume, are to be left to rest upon his shoulders, merely because he did not take upon himself the responsibility of throwing up the employment instead of obeying the order. Many considerations might reasonably induce the servant to hesitate under such circumstances. In many cases the consequences might be very serious should he refuse to obey a lawful command of the master; and any command may not be clearly and manifestly unlawful which directs the doing of nothing beyond the general scope of the business. The servant who refuses to obey must consequently expect to take upon himself the burden of showing a sufficient cause for the refusal. However clear the case might be to him, it might not be easy to make a showing satisfactory to third parties, who would naturally assume

small children received by carriers without attendants, was laid down in *East Saginaw City Railway Co. v. Bohn*, 27 Mich. 503.

¹⁵ "A master cannot be held liable for an accident to his servant while using machinery in his employment, simply because the master knows that such machinery is unsafe, if the servant has the same means of knowledge as the master." *Bramwell, B., in Williams v. Clough*, 3 H. & N. 258, 260. See *Mad River etc. R. R. Co v. Barber*, 5 Ohio, N. S. 541.

that the order was given in good faith, and that the master understood better than another the risks to be encountered in his business. The servant, also, it may reasonably be assumed, would to some extent have his fears allayed by the commands of a master, whose duty it would be not to send him into danger, and who might therefore be supposed to know when he gave the command, that the dangers were not such or so great as the servant had apprehended.¹⁶ In these cases, also, the age and immaturity of the child are of the highest importance; for a child, inexperienced in affairs and ignorant of the law, might well believe the obligation to obey was implicit, and might do so, consequently, under a species of coercion to which the will was wholly subjected.

4. The master may also be negligent in not exercising ordinary care to provide suitable and safe machinery or appliances, or in making use of those which he knows have become defective, but the defects in which he does not explain to the servant, or in continuing ignorantly to make use of those which are defective, where his ignorance is due to a neglect to use ordinary prudence and diligence to discover defects.

The point here is, not that the master warrants the strength or safety of his machinery or appliances, but that he is per-

¹⁶ In *Lalor v. Chicago etc. R. R. Co.*, 52 Ill. 401, the declaration averred an employment of the plaintiff's intestate as a common laborer in the business of loading and unloading cars, and for no other purpose; and that while he was engaged in loading a freight car with iron, the deceased was ordered by the superintendent or foreman of the company, employed to manage, direct and superintend the business of the company about the depot, to couple and connect a freight car with other cars, contrary to the special engagement of the deceased, etc., in doing which he was crushed to death. This was held to set out a good cause of action. "The company was constructively present, by and through this officer, and must be charged accordingly. It was, then, by the direct command of the company the deceased was exposed to this peril, and one out of the line of the business he had contracted to perform. He was killed by the negligence of the driver in charge of the locomotive while thus exposed. The law would be lamentably deficient did it furnish no remedy in such a case." Breese, Ch. J., p. 404. See also, *Indianapolis etc. R. R. Co. v. Love*, 10 Ind. 556.

sonally negligent in not taking proper precautions to see that they are reasonably strong and safe. The law does not require him to guaranty the prudence, skill or fidelity of those from whom he obtains his tools or machinery, or the strength or fitness of the materials they make use of. If he employs such reasonable care and prudence in selecting or ordering what he requires in his business, such as every prudent man is expected to employ in providing himself with the conveniences of his occupation, this is all that can be required of him; but for an injury resulting to the servant from a failure to exercise this care and prudence he may be and ought to be held responsible.¹⁷

5. The master's negligence may also consist in employing servants who are wanting in the requisite care, skill or prudence for the business entrusted to them, or in continuing such persons in his employ after their unfitness has become known to him, or when, by the exercise of ordinary care, it would

¹⁷ *Keegan v. Western R. R. Co.*, 8 N. Y. 175, is a leading case. The injury occurred from continuing to use a defective and dangerous locomotive after notice to the company of its dangerous condition. And see *McGatrick v. Wason*, 4 Ohio, N. S. 566; *Cayzer v. Taylor*, 10 Gray, 274; *Columbus etc. R. R. Co. v. Arnold*, 31 Ind. 174. In *Noyes v. Smith*, 28 Vt. 59, a declaration was sustained which charged the defendants with negligence in putting the plaintiff, their servant, in charge of an insufficient engine, whose insufficiency was unknown to the plaintiff, and but for the want of care and diligence would have been known to the defendants. The like doctrine is declared in *Snow v. Housatonic R. R. Co.*, 8 Allen, 441; *Seaver v. Boston etc. R. R. Co.*, 14 Gray, 466; *Hackett v. Middlesex Manuf. Co.*, 101 Mass. 101; *Laning v. N. Y. Cent. R. R. Co.*, 49 N. Y. 521; and *Illinois Central R. R. Co. v. Welch*, 52 Ill. 183. The peril in the case last cited was the projecting awning of the station house, which was liable to strike a passing car. Say the court: "The evidence shows that the peril had long before been observed by other employees, and the attention of both the division superintendent and division engineer called to it. This circumstance takes away all excuse from the company, and brings the case within the legal proposition of appellant's counsel, since it was a peril known to the employer and not revealed to the employee." The rule has been applied to the case of a railroad company which was charged with negligence in permitting its road to become blocked with snow and ice, and a car to be out of repair, by means whereof the plaintiff was injured, *Fifield v. Northern R. R. Co.* 42 N. H. 225.

have been known. "The servant when he engages to run the risks of the service, including those arising from the negligence of fellow servants, has a right to understand that the master has taken reasonable care to protect him from such risks, by associating him only with persons of ordinary skill and care."¹⁸

The obligation to employ suitable servants is precisely the same as that to provide suitable machinery and appliances for the business. It has been thus stated in a railroad case: "A railroad corporation is bound to provide proper road, machinery and equipment, and proper servants. It must do this through appropriate officers. If acting through appropriate officers it knowingly and negligently employs incompetent servants, it is liable for an injury occasioned to a fellow servant by their incompetency. If it continues in its employment an incompetent servant after his incompetency is known to its officers, or is so manifest that its officers, using due care, would have known it, such continuance in employment is as much a breach of duty and a ground of liability as the original employment of an incompetent servant."¹⁹

6. It is also negligence for which the master may be held responsible, if knowing of any peril which is known to the servant also, he fails to remove it in accordance with assurances made by him to the servant that he will do so. This case may also be planted on contract, or on the less questionable ground of duty. If the servant, having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and

¹⁸ Alderson, B. in *Hutchinson v. Railway Co.*, 5 Exch. 343.

¹⁹ Gray, J. in *Gilman v. Eastern R. R. Co.*, 13 Allen, 433. The same point is strongly put by Folger, J. in *Laning v. N. Y. Cent R. R. Co.*, 49 N. Y. 521, 533. See also *Tarrant v. Webb*, 18 C. B. 797; S. C. 37 E. L. & Eq. 281; *Illinois Cent. R. R. Co. v. Jewell*, 46 Ill. 99; *Harper v. Indianapolis etc. R. R. Co.*, 47 Mo. 567, and cases cited; *Moss v. Pacific R. R. Co.*, 49 Mo. 167; *Pittsburg etc. R. R. Co. v. Ruby*, 38 Ind. 294; *Davis v. Detroit etc. R. R. Co.*, 20 Mich. 105; *McMahon v. Davidson*, 12 Minn. 357; *Weger v. Pennsylvania R. R. Co.*, 55 Penn. St. 460.

imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover the assurances remove all ground for the argument that the servant, by continuing the employment engages to assume its risks. So far as the particular peril is concerned the implication of law is rebutted by the giving and accepting of the assurance; for nothing is plainer or more reasonable than that parties may and should, where practicable, come to an understanding between themselves regarding matters of this nature.²⁰

7. As the servant only undertakes to assume the hazards of his own employment, it must follow that if the master carries on another and wholly distinct business, an injury occasioned by the negligence of a servant in such other business, not being within the contemplation of the employment, will give ground for an action under the same circumstances which would render liable any stranger who might have been the employer of the negligent servant.²¹

IV. It has now been seen that the master is liable in all cases where the injury has resulted from his own negligence, and not from any of the customary risks of the employment.²² But there still remains the very serious difficulty

²⁰ See *Patterson v. Wallace*, 1 Macq. H. L. 748; s. c. 28 Eng. L. & Eq. 48; *Laning v. N. Y. Cent. R. R. Co.*, 49 N. Y. 521.

²¹ This is implied in all the cases which hold the master not responsible to a servant injured by the negligence of another servant in the *same* employment. See *Farwell v. Boston etc. R. R. Co.*, 4 Met. 49.

²² For this general rule the following additional cases may be cited: *Roberts v. Smith*, 2 H. & N. 213; *Mellors v. Shaw*, 1 Best & Smith, 437; *Ashworth v. Stanwix*, 3 Ellis & Ellis, 701; *Columbus etc. R. R. Co. v. Webb*, 12 Ohio, N. S. 475; *O'Donnell v. Alleghany Valley R. R. Co.*, 59 Penn. St. 239; *Johnson v. Bruner*, 61 Id. 58; *Harrison v. Central R. R. Co.*, 31 N. J. 293; *Paulmeiser v. Erie R. R. Co.*, 34 N. J. 151; *Chicago etc. R. R. Co. v. Harney*, 28 Ind. 28; *McGlyn v. Brodie*, 31 Cal. 376; *Chicago etc. R. R. Co. v. Jackson*, 55 Ill. 492; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282. The rule was carried so far in *Flike v. Boston etc. R. R. Co.*, 53 N. Y. 549, as to hold (four judges to three) a railroad company liable as for its own negligence for the act of a subordinate in sending out a train insufficiently supplied with brakemen. But compare *Mad River etc. R. R. Co. v. Barber*, 5 Ohio, N. S. 541; *Skip v. Eastern Counties R.*, 9 Exch. 223.

of determining what, in particular cases, is fairly imputable to the master as a neglect of personal duty, or on the other hand, is to be regarded as neglect on the part of one of his subordinates for which the master could not be called upon to respond to those in his service.

We have seen that in some cases the master is charged with a duty to those serving him which he cannot divest himself of by any delegation to others. He is charged with such a duty as regards the safety of his premises, the suitability of the tools, implements, machinery or materials he procures or employs, and the servants he engages or makes use of. Whoever is permitted to exercise the master's authority in respect to these matters is charged with the master's duty, and the latter is responsible for a want of proper caution on the part of the agent, as for his own personal negligence.²³ But these are not the only cases in which the master is to be considered as represented by an agent, who for the time being is charged with his duty. A corporation can only manage its affairs through officers and agents, and if it is to be held responsible to its servants for negligence in any case, it must be because some of these are negligent. But whose negligence shall be imputed to the corporation as the negligence of the principal itself? Certainly not that of all its officers and agents, for this would be to abolish wholly, in its application to the case of corporations, of a rule alike reasonable and of high importance.

So far as the board of directors are concerned, no question can be made that for any such purpose they represent the corporation, and its acts, as a board, are the acts of a principal. They constitute the highest and most authoritative expression of corporate volition, and the corporate duties are duties to be performed by the board. But such a board holds only periodical meetings, and at other times the powers of the corporation are usually expected to be, and actually are, exercised by some officer or general superintendent with

²³ *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240; *Wright v. N. Y. Cent. R. R. Co.*, 25 N. Y. 562; *Laning v. N. Y. Cent. R. R. Co.*, 49 N. Y. 529; *Chicago etc. R. R. Co. v. Jackson*, 55 Ill. 492.

large discretionary powers. Unless such officer or superintendent is to be considered as occupying, for all the purposes of the rule now under consideration, the position of the principal itself, it is obvious that there must be assumed in the case of corporations, and indeed in other cases where the whole charge of the business is delegated to another, some risks which the servant does not assume where the master himself takes general charge in person.

It has been seen that the superior position of the negligent servant, as that of a foreman, conductor, etc., is not regarded as affecting the case. But a foreman is not necessarily or usually, perhaps, entrusted with any large share of the master's discretionary authority. Neither is the conductor of a train of cars, except as to the particular duty of taking it safely to its destination. His duty may be and probably is less responsible than that of the telegraph operator who directs his movements and those of others in charge of trains on the line; and if the conductor is to be regarded as principal for some purposes, so should the operator be for others. But this would suggest questions and distinctions that could only be confusing, and would preclude the possibility of any settled rule whatsoever. It would seem that the law could go no farther than to hold the corporation liable for the acts and neglects of the officer exercising the powers and authority of general superintendent; but that for these it ought to respond to its servants, as for its own acts or neglects.²⁴ But this in no way affects the general rule which requires of any employer, whether corporate or not, to employ suitable servants, and to make use of safe tools, machinery, etc., or at least, to take care that there is no negligence in procuring them.

V. Where the master is sued by his servant for an injury which it is claimed has been occasioned by his negligence, the same rule applies as in other cases, that the plaintiff is not to recover if his own negligence contributed with that of the plaintiff in producing the injury.²⁵ This subject will not

²⁴ See Shearm. & Redf. on Neg., §§ 101-104.

²⁵ *Hayden v. Smithville Manf. Co.*, 29 Conn. 548; *Johnson v. Bruner*, 61 Penn. St. 58.

be discussed here, but it may be remarked that if the injury has resulted from a peril which had come to the knowledge of the plaintiff and ought to have been known to the master, it may justly be held to be contributory negligence on the plaintiff's part if he failed to report it.²⁶ It may also be remarked that in all cases where the servant claims to recover on the ground of the master's negligence, the burden of proof will be upon him, not only because as a plaintiff he must make out his case, but also because all presumptions will favor the proper performance of duty.²⁷

VI. Perhaps this whole subject may be accurately summed up in a single sentence as follows: The rule that the master is responsible to persons who are injured by the negligence of those in his service, is subject to this general exception: that he is not responsible to one person in his employ for an injury occasioned by the negligence of another in the same service, unless generally or in respect of the particular duty then resting upon the negligent employee, the latter so far occupied the position of his principal as to render the principal chargeable for his negligence as for a personal fault.

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²⁶ See *Kroy v. Chicago etc. R. R. Co.*, 32 Iowa, 357; *Davis v. Detroit etc. R. R. Co.*, 20 Mich. 105; *Mad River etc. R. R. Co. v. Barber*, 5 Ohio N. S. 541.

²⁷ See *Gilman v. Eastern R. R. Co.*, 10 Allen, 233; *Wright v. N. Y. Cent. R. R. Co.*, 25 N. Y. 562; *Hildebrand v. Toledo etc. R. R. Co.*, 47 Ind. 399.

V. CONCERNING THE BURDEN OF PROOF.

IMPORTANCE AND DIFFICULTY OF QUESTIONS AS TO BURDEN OF PROOF.—In the trial of a judicial issue the first point to be determined is by whom the evidence in the case is to be offered, and to what extent must this evidence proceed. Various theories on this point have been stated. Two of the most prominent are the following :

Theory that on the Affirmative Lies the Burden of proof.—Among the most authoritative exponents of this view is Mr. Best, in his treatise on Evidence.¹ “The general rule,” he declares, “is that the burden of proof lies on the party who asserts the affirmative of the issue, or question in dispute—according to the maxim, ‘Ei incumbit probatio qui dicit, non qui negat;’” and to this effect he cites Mr. Starkie and Mr. Philips, sustaining his views by a copious exposition. A distinguished German jurist and statesman, Bethman-Hollweg, has given his adhesion to the same view.² The question of the burden of proof, he argues, is not confined to merely juridical relations. We will not err, therefore, if in such discussion, we turn for illustration to the analogies of ordinary life. How is it, for instance, in a controversy as to a historical fact, or a natural phenomenon? When a third person asserts such fact or phenomenon, on such person, we declare, lies the burden of proof if the assertion be denied. We refuse assent until proof of the assertion is brought. This, however, is identical with the rule that he who affirms, not he who denies, must prove. It is true that this is not applicable to many cases, as, for instance, where there is a double hypothesis, of which the first party asserts one alternative, and the second party asserts the other alternative. But in such case, as on neither party lies a burden of proof, the rule as above given is not affected.

¹ Best's Evidence, 5th ed. 396.

² Versuche, p. 337.

In the relations of common life, therefore, we apply the rule "affirmanti incumbit probatio, non neganti." It is true, he proceeds to say, that we dispense practically with this rule in common life, in cases where there is not a direct issue of affirmation or denial. But this is not the case in civil process, where such an issue always exists, for in such case one party necessarily claims a right which another resists. Whoever claims a right, affirms such a right, and must prove it, for the reason that it cannot be admitted by the judge without proof.

Reply to this theory.—But to this it has been well replied,³ that the very exception made by Bethman-Hollweg shows that the rule he advocates can have only a limited application to judicial investigation. He admits that the rule does not apply when there are two or more conflicting interests; but rare are the litigated issues in which two or more interests do not conflict. Nor is this all. In many cases each party unites, with an affirmation on his part of his own rights, a denial of the rights of his opponent; and the affirmation and denial are so blended as to be incapable of severance in proof. Nor can we agree that the investigations of common life can be a rule decisive of those in a court of justice. Every trial is a public contest, in which a litigant appears to advance a right. If this right is denied by an opponent, then the decision is referred to a court, duly constituted as the organ of the state. The court, when the case comes before it, is bound to know nothing as to the merits of the issue, and must, therefore, before a decision be made, be advised as to such merits, by the party making such claim, whether the claim consist in establishing a right for himself, or in releasing himself from the right of another. On the party putting forth such right, this duty is incumbent. "Jura socordibus non succurrent." The defendant, on the other hand, seeks to relieve himself from the plaintiff's case, either by a direct traverse, *inficiatione*, or through a plea of avoidance, in which he sets up a conflicting claim to bar the plaintiff's demand. If he takes this second attitude, he is in the

³ Hefter, Appendix to Weber, 259.

same position as the plaintiff, and he must assume the burden of proof in making good his defence. Whenever, whether in plea, or replication, or rejoinder, or surrejoinder, an issue of fact is reached, then, whether the party claiming the judgment of the court asserts an affirmative or negative proposition, he must make good his assertion. On him lies the burden of proof.

So speaks more than one emphatic ruling of the Roman jurists, when dealing with this very topic. "Semper necessitas probandi incumbit illi qui agit."⁴ Whoever undertakes the role of advancing a claim, whether that claim be the maintenance or the release of rights, must make good his case. A defendant who seeks to relieve himself from the established right of another, is in this respect in the same position as the plaintiff, by whom a right is to be established. "Reus excipiendo fit actor." So far as concerns pleas, (*exceptionibus*) Ulpian tells us,⁵ "that the defendant may take the part of the actor, in which case he must prove his claim, *e. g.* if he set up a countervailing contract, (*pactum conventum*) he must prove that such contract was actually executed. Celsus⁶ applies the rule as follows. A legacy of five hundred gold pieces is left to you, and to the same will is attached a codicil giving you the same amount. The question arises whether the testator meant to double the amount, or only to affirm in the codicil that which he had forgotten he had stated in the body of the will. On which party, the legatee or the representatives of the testator, in a suit for the double sum, is the burden of proof? At the first view, so concludes Celsus, it seems more equitable (*æquius*) that the burden should be on the legatee, to make good his claim. But if there be avoiding evidence, this must be adduced by the defendant. If, for instance, I sue for money lent, and the defendant answers that the money has been paid back, this defence it is incumbent on him to prove. "Ipse hoc probare cogendus est." In the case of the will before us, therefore, if the plaintiff proves both

⁴ L. 21 D. de probat ; L. 9, C. de except.

⁵ L. 19 D. de probat. XXII, 3.

⁶ L. 12 Id.

will and codicil, and the defendant undertakes to show that the codicil is inoperative, the burden is on him to prove this satisfactorily.

The theory of the Roman law in this relation is, that the part of an actor is undertaken only by him whose rights are either denied or doubted. In this category falls not only the plaintiff who claims a right, but the defendant, who claims to defeat by his own claim another's right; and it is incumbent, therefore, on the latter *exceptionem velut intentionem implere*.⁷ On the other hand, the *reus*, or defendant, who quietly and silently waits the plaintiff's attack, interposing only a plea in bar, has no burden in respect of proof. "Actori non probante, qui convenitur, etsi nihil ipse præstiterit obtinebit."⁸

So far as concerns the Roman maxim, on which Mr. Best and those whom he cites rely, as of first authority, little need be said. "Ei incumbit probatio, qui dicit, non qui negat," is undoubtedly of classical origin,⁹ and with this may be coupled "negantis naturali ratione nulla est probatio."¹⁰ But to affirm that these maxims were set forth as containing a complete theory as to the burden of proof, is to affirm, as Hefter remarks,¹¹ that the jurists, on a question of high importance, to which they gave peculiar thought, announced two theories in direct conflict. We must therefore treat the maxim "Ei incumbit probatio, qui dicit, non qui negat," as equivalent to "Actori incumbit probatio;" and if we do not subordinate the second maxim to the first, we must subordinate the first to the second. That the jurists regarded the first maxim simply as a formal variation of the second, there is good exegetical reason to assert. *Dicere*, like *asseverare*,¹² may well mean to *claim*.¹³

It is asserted in defence of the rule here contested, that a negative cannot be proved, and hence, as only an affirmative

⁷ L. 19, pr. D. Id.

⁸ L. 4 C. de edendo.

⁹ L. 2 D. de probat.

¹⁰ L. 23 C. eod.

¹¹ Weber, Hefter's app. 264.

¹² See L. 19 C. de probat.

¹³ See authorities to this point in Hefter's app. to Weber, 265.

is provable, on the affirming party alone can rest the burden of proving. To this the following replies may be made :

The enquiry is not for mathematical certainty, but for such probability, higher or lower, as is obtainable in judicial proceedings. High probability is the best we can obtain in any case ; high probability may be reached as to the non-existence of many things which are claimed to exist. Arguments drawn from non-juridical fields do not here apply. It may be difficult for me to prove that a thing does not exist in all space, or that certain occult intents may not lurk in the undisclosed recesses of a particular party's heart. But jurisprudence has to do with no such vague domains. Its territory is limited. It enquires whether in a particular spot, at a particular time open to human observation, a particular thing existed ; or whether by the small range of witnesses to whom a party at a particular time was visible, he gave signs of the suspected intent. It is possible, within such limited range, to call all witnesses who were likely to have been at the given spot, or observed the given person at the particular time ; and hence it is here possible to approach a negative by gradually exhausting the affirmative. In fact, as is well argued,¹⁴ what is counter-proof in most cases (*e. g.* in an *alibi*), but proof of a negative? In answer to bills of discovery in the old practice, and in the defendant's personal denial of the plaintiff's case in the new practice, we constantly meet with proof of negation. We may prove a negative in an *abili*, for instance, indirectly, by proving conditions incompatible with the alleged fact, showing for instance, that a party charged was in another place than that necessary to the plaintiff's case ; or we may do it directly by calling a witness present at the latter place, and proving that the defendant was not there. So also, when a plaintiff sues for a debt, if the defendant can produce an admission from the plaintiff that the debt was never incurred, this is proving a negative, but a negative which, if believed, will defeat the plaintiff's case. How often is the question put, "Could such a thing have been done without your seeing it?" and how conclusive has sometimes

¹⁴ See Meier, Colleg. Argent. lit. de prob. 87 ; Weber, Hefter's ed. 135.

been held a negation based upon the hypothesis that without the witness seeing an event, it could not have happened. In actions for malicious prosecution, if the plaintiff does not in some way approach to proof of a negation of his guilt, his case is not made. So, to take one more illustration, suppose upon a suit by A against B, B sets up as a defence that A is dead; how is B to prove such defence in cases in which A, if he were living, would be over one hundred years old? If A had died fifty years back, it might be difficult to find witnesses who saw him die, and the best that the defendant could do would be to prove that for years A had not been seen or heard of alive. If we did not rely on negative proof or on negative presumptions, which are the same thing, those who died out of the memory of man would have to be juridically treated as permanently alive.

The Tichborne trials are fruitful of illustrations of this position. The claimant, in the civil issue tried before Chief Justice Bovill, undertook to prove that he was Roger Tichborne, the heir to a baronetcy and to large landed estates, for which the suit was brought. It was conceded that Roger Tichborne, who the plaintiff claimed to be, had left England shortly after arriving at majority; had wandered for some months in South America; was reported to have been lost at sea by the foundering of a designated vessel; and had not been heard from for twelve years, at the time when the claimant appeared in Australia to claim the title and estates. Here, we might at the outset say, is a case requiring pure affirmative proof. The claimant has simply to prove that he is Roger Tichborne, and here the case rests. But the facts brought up in this very issue were such as to impose on the claimant the proof of several negatives, which were essential to make up the proof of the affirmative. The claimant for several years, when in South America and in Australia, had made himself known as Thomas Castro; and that there was such a person as Thomas Castro was part of the claimant's case. So, also, a part of this very case exhibited the evidence of a person named Arthur Orton, a London butcher, who several times appeared in the alleged track of the genu-

ine Roger Tichborne, and whose name the claimant sometimes assumed. Here, then, as part of the claimant's evidence, we have exhibited to us three persons: Roger Tichborne, Thomas Castro and Arthur Orton. It may have been with some plausibility argued that Thomas Castro and Arthur Orton were the same person, Thomas Castro being an alias for Arthur Orton; though there was some perplexing evidence showing the presence of Thomas Castro and Arthur Orton together, as distinct individuals, at the same place. But however this may have been, no such proof was possible as to the identity of Arthur Orton and Roger Tichborne. Thomas Castro may have been indeed only a mask; but as to the distinct and mutually exclusive individualities of Arthur Orton and Roger Tichborne, there could be no question. They were indisputably living at the same time, at distinct places, and in very distinct relations; Arthur Orton being a butcher's boy in Wapping, Roger Tichborne the heir to an ancient estate, living in his boyhood in Paris, where he was educated, then visiting his relations in England, then serving as an officer in the British army. If the claimant was Arthur Orton, he could not have been Roger Tichborne. But it was incidental to his case that he more than once had appeared as Arthur Orton. He had imposed on him, therefore, the burden of proving a negative, namely, that he was not Arthur Orton. He had avowedly lived for years as Thomas Castro, a bush ranger in Australia. It was necessary for him, therefore, to prove another negative, viz.: that there was really no such distinct person as Thomas Castro. The attitude assumed by a party in such cases is not unfamiliar in logical processes. If A is not B or C, he is D—but he is not B or C; therefore he is D. On A is the burden of proving that he is not B or C.

In actions of negligence the actor (whether plaintiff as to defendant's negligence, or defendant as to plaintiff's contributory negligence,) frequently depends upon proof of an omission. Did a switch tender omit to watch his switch? Did a telegraph operator omit to signalize when it was his duty to do so? Was the oiling or testing of the

wheels omitted? Did the engine-driver omit to ring the bell? Or, on the other hand, did the plaintiff, when approaching the road, omit to look out? Did he omit to check his speed? Questions such as these rise in every suit for injuries alleged to occur through negligence. Upon the solution of such questions the issue in many instances depends. To prove the omissions in each of these cases involves the proving of a negative; yet it has never been doubted that it is the function of a party to prove such omissions, when if he does not do so he will lose his case.

The true solution of the question is that he who in a court of justice undertakes to establish a claim against another, or to set up a release from another's claim against himself, must produce the proof necessary to make good his contention. This proof may be either affirmative or negative. Whatever it is, it must be produced by the party who seeks forensically either to establish or to defeat the claim.

We may notice, as giving a concrete exhibition of the distinctions just stated, the familiar case of suits brought by a servant against a master for injuries occurring to the servant through the master's want of care in providing for the servant proper machinery. The point in such cases may be raised either in contract or in tort. The plaintiff may say, "You undertook to provide proper machinery with which I should work; you virtually guaranteed this; you failed to comply with your engagement; I sue you for the damage to which I have been thereby subjected." Or he may say, "You own this machinery; you employed me to work it; on the principle "*sic utere tuo ut alienum non laedas*" you are bound to me in tort for the hurt to which I have been subjected." In neither case, however, can the plaintiff recover, if the risk through which he suffered was one of the ordinary incidents of his service which he was bound to assume; and whether he sue in contract or in tort, he is obliged to prove that his injury was not produced by one of the risks so assumed by him. He must, therefore, to make out his case, prove a negative. He must show, directly or inferentially, that he did not assume the risk.¹⁵

¹⁵ See to this general question, *Mann v. Oriental Mills*, Sup. Ct. R. I.,

It is in cases of tort that Roman jurists, both ancient and modern, have found the greatest difficulty in the determination of the question before us.¹⁶

The true distinction is this: the burden lies on the party seeking in a court of justice either to make good his claim for damages arising from the tort of another, or to establish a release from such claim supposing it to be made out against himself. In either case he must prove his particular contention. Hence, according to the Roman law, he who charges *dolus* or *culpa* on another, must prove such *dolus* or *culpa*; while he who, on such case being made out, sets up *casus*, or the contributory agency of the plaintiff, must prove such *casus* or contributory agency.¹⁷

Where a person is sued for a negligent injury, which is not a violation of a contract, the burden of proving negligence is on the plaintiff. In the Roman law, he who inflicts negligent injury on the person or property of another may be held liable under the Aquilian statute. In our own law a similar liability is enforced by the application of the principle "sic utere tuo ut alienum non laedas."¹⁸ When a person is sued for an injury so inflicted on property, being under no contractual liability to exercise *diligentia* or *custodia* as to a particular thing, it is incumbent on the plaintiff in such cases to prove either malice or gross negligence on the part of the defendant. "Qui dolo dicit factum aliquid, licet in exceptione, docere dolum admissum debet."¹⁹

When a person who contracts to perform a particular duty as to another person or thing, is sued for negligent injury to such person or thing, then the plaintiff need only

June, 1875, pamph. Rep.; *Holmes v. Clark*, 6 H. & N. 349; *Button v. R. R.*, L. R. 7 Exch. 130; *Coombs v. New Bedford Co.*, 102 Mass. 586; *Fifield v. R. R.*, 42 N. H. 240; *Laning v. R. R.*, 49 N. Y. 534; *Porter v. R. R.*, Cent. L.J., June 11, 1875.

¹⁶ See particularly Leyser, *Medit. ad Pand.* sp. 176; Hopfner, *Comment. Inst.* § 761, n. 4. Gluck, *Pandekt.* 4, § 324; Schmidt, *Comment. von Gericht. Klagen*; Endemann, *Beweislast*, 49; Weber, *Hefter ed.* 172.

¹⁷ Weber, *Hefter ed.* 173.

¹⁸ Whart. on Neg. § 786.

¹⁹ L. 18, § 1; D. de probat.

prove the injury; and the burden is on the defendant to excuse himself by proof of the exercise of due diligence. What such diligence is, depends upon the nature of the contract as elsewhere discussed. That it must be proved as an excusatory defense by the defendant, and that the burden is on him to do so, has been frequently ruled.

The defendant has engaged to perform a particular duty, and the tort consists in the non-performance of such duty. That the defendant failed to perform his duty through negligence, is not part of the plaintiff's case. The plaintiff, it is true, in proving the non-performance of duty by the defendant, may bring out such incidents as show negligence on the part of the defendant. But it is not a necessity of the plaintiff's case to do this; and if the defendant desire to relieve himself by showing a due performance of duty, he must do so either by directly traversing the plaintiff's case as to the fact of injury, or by proving, (and the burden is on the defendant to do so,) that the injury occurred without the fault of the defendant. A creditor, for instance, receives a piece of silver plate in pawn. If this is lost, without any *culpa* on his part, he must prove this fact in order to be released from liability.²⁰ A herd of goats are taken by a herdsman to pasture. They are carried off by robbers, without the fault of the herdsman. It is not necessary for the owner to prove want of due care in the herdsman, but the burden is on the herdsman to prove that the loss of the herd was not due to want of care by himself.²¹

Suppose, for instance, goods are hired by H from L, and when in H's possession are damaged, either through defects existing in the goods when in H's possession, or through H's misconduct. If the views above given be correct, the burden is on H, when sued for the loss, to show that the loss was due either to causes involving no misconduct on his part, or to defects inherent in the goods at the time they were hired. If he cannot make out such a defence, he is bound to indemnify the owner. It is true, as has been urged, that it is a fraud

²⁰ L. 5 C. de pig. act. IV, 24.

²¹ L. 9, § 4, D. loc. XIX, 2.

in the owner of goods, who, knowing them to have latent defects which will cause their depreciation or loss, withholds notice of such defects from the hirer. But to this it is pertinently replied, that business would be brought to a standstill if the owner of goods, in a suit for injuries sustained by them, was compelled to prove that which from the nature of things he could rarely be able to do, that the goods, when they left his possession, were free from latent faults.²²

Public policy, in such case, unites with juridical principle in requiring the possessor (that is, the bailee of the goods,) to prove that they were damaged without his fault.

The rule is not altered in cases where the plaintiff alleges negligence in his complaint.—If, in cases of bailment, the plaintiff suing in tort alleges negligence in his declaration, is the burden on him to prove such negligence? The Roman law answers this question in the negative; though it is admitted that in the strict order of proof such burden may lie on the plaintiff in his replication. The plaintiff, for instance, alleges a negligent loss of goods; and under this allegation it is enough to prove that the goods were not restored to the plaintiff on demand. The defendant sets up *casus* as a defence. If the plaintiff desires to avoid this defence by showing that the *casus* was induced by the defendant's negligence, then the burden is on the plaintiff to prove such inculpatory negligence on the part of the defendant. It is true that this conclusion has been vigorously contested.²³

If the plaintiff, it is urged, avers negligence by the defendant, it is incumbent on the plaintiff to prove such averment. But the answer to this is, that in suits for tort in non-performance of contract, when the contract is duly set forth, and the defendant's failure in duty in this respect is duly averred, then the averment of the defendant's negligence is surplusage, not necessary to the plaintiff's formal case, and not, therefore, requiring proof. An expression of this kind, introduced from abundant caution, or in deference to the old cumbrous mode of pleading, courts will now permit the

²² See Weber, Hefter's ed. 177.

²³ See Leyser, Medit. Pand. sp. 176; Med. 5-6.

plaintiff to strike out under the statutes of amendment, or will treat as surplusage; for it would be a perversion of justice to insist upon the formal and remediable error of an attorney bringing with it substantial and irremediable injury to the client.

But it is otherwise when the plaintiff, instead of suing for tort in non-performance of the contract, elects to waive the contract, and to prove the case of an injury based on non-contractual (or Aquilian) negligence. In such case, the defendant's negligent or wilful misconduct being part of the plaintiff's case, must be proved by the plaintiff.²⁴

When the defendant is sued in tort for damages incurred through non-performance of a contract of agency, the burden is on him to prove due care.—If he sets up impossibility, for instance, such impossibility it is his duty to prove.

If, however, the plaintiff reply that the impossibility or *casus* was induced by the defendant's misconduct, the plaintiff must prove such misconduct. A bailee, for instance, who is sued for damage done to his bailor's property, has the burden on him of proving that the damage was done through *casus fortuitus*.

Questions of interest arise when suit is brought upon an instrument to whose validity certain formalities are requisite. Is the plaintiff or the defendant to prove such formalities? It is plain that when the law makes the validity of the instrument depend upon these formalities, then they must be duly proved by the plaintiff. If a statute, for instance, makes an instrument inoperative unless duly registered or stamped, then the instrument cannot be put in evidence without proof of such registry or stamp. But a *prima facie* case of compliance with the law in this respect is sufficient for the plaintiff's case. Where a statute, for instance, requires that a will, to be operative, must be attested by three subscribing witnesses, it is enough for the plaintiff's case to show that three witnesses actually subscribed the will. If either of such witnesses was incompetent, this must be shown by the defendant. So where the attestation of a notary is necessary to a writing,

²⁴ See Weber, Hefter's ed. 180.

it is enough for the plaintiff to show that the notary was a person usually acting as such; if he was an imposter acting without authority, this must be shown by the defence.²⁵

The burden of proving a negative is thrown on a party whenever proof of such negative is essential to his case.—It makes no difference whether the party to whom such proof is essential is plaintiff or defendant. I may illustrate this position by one of the most extraordinary cases to which American litigation has given rise. In February, 1872, Winfield S. Goss of Baltimore, having previously insured his life for \$25,000, was found, it was alleged, dead, in a work-shop belonging to him; his death having been, it was pretended, caused by a fire by which the building was partially consumed. His widow brought suit against the insurance companies, and recovered; the chief witness to prove identity being her brother, William E. Udderzook, and her husband's brother, Alexander C. Goss. The defence made by the insurers was that the remains were not those of Winfield S. Goss. In July, 1873, the body of a murdered man was found in Baer's Woods, near Westchester, Pennsylvania; and there was strong evidence charging, as the agent of the homicide, William E. Udderzook. He was indicted for murder, and the trial took place at West Chester, in November, 1873. The case which the prosecution undertook to prove contained at least two negatives: first, that the body found in Baer's Woods, West Chester, in July, 1873, was not that of A. C. Wilson, if that name represented a person other than Winfield S. Goss; and secondly, that the body found in the workshop in Baltimore, in February, 1872, and which was claimed to be that of Winfield S. Goss, was not that of Winfield S. Goss. It was a necessary incident of the prosecution's case that the person murdered in Baer's Woods had gone for a few months before his death, both in Newark, New Jersey, and in Chester county, Pennsylvania, by the name of A. C. Wilson; and it was plain that if there was a person known continuously by the name of A. C. Wilson, this would defeat one of the essential points in the prosecution's case,—that the

²⁵ Weber, Hefter's ed. 192.

deceased was Winfield S. Goss. It was also necessary for the prosecution to prove that the body found in February, 1872, was not that of Winfield S. Goss; for if it had been such body, this also would have been destructive of the prosecution's case. Nor was this all. Udderzook was tried, convicted, and executed for murder, the prosecution having satisfactorily made out these with the other necessary ingredients of the case. The insurance companies then brought suit in the United States circuit court in Baltimore, against Alexander C. Goss and others, for a conspiracy to defraud them, by falsely claiming the corpse found in Baltimore, in February, 1872, to be that of Winfield S. Goss. Now, in each of these three cases, those contesting the identity of the corpse so discovered with that of Winfield S. Goss, had a negative to prove, though in the first case this negative was undertaken by the defendant, in the second by the prosecution, (occupying the processual attitude of a plaintiff), and in the last by the plaintiff. But we need not such an illustration, however pointed, to prove that with respect to the form of action, an *actor* (*i. e.* one who has on him the burden of proof), may be either plaintiff or defendant. It is enough to take this case as one among multitudes that show that wherever a negative is part of a case, whether that case be that of the plaintiff or of the defendant, then such negative must be proved.²⁶

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²⁶ See on this point *Parsons v. McKibben*, 5 Ind. 261; *Duffield v. Delancy*, 36 Ill. 258.

[The author reserves the privilege of republishing hereafter, in treatise form, the statements of principle contained in the above article.]

VI. THE FEDERAL COURTS.

(NO. 3.)

"Veritas visu et mora, falsa festinatione et incertis valescunt."
tus, Ann II. 39

Before proceeding to develop our ulterior views on administration of justice in the Federal courts, we deem it essential to glance at the actual condition of the Federal government.

It has been said that, of all systems of government, the most difficult to establish and to render effectual is the Federative system. This system consists in leaving each member of the association all the powers not indispensable to the efficient action of the central government. In theory such a government is simple; in practice, complex; because it is extremely difficult to apportion the local powers of each member, in such a manner as not to clash with or impede the powers requisite to enable the general government to act with promptness and energy in emergencies, when the interests of the whole require its interference. The permanent establishment of such a government requires a high degree of moral and intellectual culture; and publicists seem to doubt if any modern society is sufficiently advanced to establish a permanent federative system.¹

The government of the United States is not only a representative but a federative government; and although it is generally admitted that its authors displayed consummate wisdom and sagacity in its formation, yet it has been said that "it should not be forgotten that the problem they had to solve was to determine the best practical government for an intelligent and laborious people, nearly homogeneous in

¹ Guizot, *Cours d'histoire moderne*, Vol. 6, 4me Leçon, p. 29; Sismondi *Const. des peuples libres*, Introd.

language, manners and views, devoted chiefly to agriculture, comparatively poor, and as yet uncorrupted in their morals, and actuated by a lofty patriotism, fostered and developed by a seven year's war, necessary to secure their independence. The country they inhabited was at the formation of the federal constitution almost unknown. Two and a half millions of inhabitants dwelt at the time on the eastern slope of the Alleghany mountains, and cultivated a soil which, though not barren, required both skill and perseverance to render productive. Agriculture and commerce were both in their infancy, and the remarkable man who had, with such signal success, conducted the armies of the Union in the struggle for independence, had, by his moderation, set so exalted an example of his love of country and patriotism, that all other ambitions, if any existed, had to conceal their aspirations to govern the country. Such a juncture in the affairs of nations is rare, and history is believed to furnish no other example of a similar nature." Whether the organic law of the United States will resist "the corroding tooth of time" and the vicissitudes to which all human affairs are subject, are questions the solution of which is reserved for an inscrutable future.

We think, however, that it may safely be asserted, that the organization of the Supreme Court in 1789, when the population of the United States amounted to about three millions, inhabiting the eastern slope of the Alleghany mountain chain, when the country north and west of this chain was an unknown and unexplored wilderness, in the undisputed possession of the aborigines, is not properly adapted to a population exceeding forty millions, dwelling on an area exceeding, probably an hundredfold, the space which in 1787 limited their industrial and commercial activity.

One of the anomalies in the constitution of the court, calculated to a certain extent to impair the dignity of the tribunal, as well as its efficiency, was the provision requiring the justices to preside in the circuit courts, and for that purpose travel through the different states constituting their respective circuits, at stated periods. Mr. Jay, the first chief justice

of the United States, in answer to a letter of President Washington dated April 2, 1790, requesting him and his associates, as they were about to set out on their first circuit, to communicate to him such information and remarks in relation to the operation of the system as they might from time to time judge it expedient to make, suggested, that calling on the judges to preside in the circuit courts, was "an important deviation" from the constitution. The answer of the judges will be found at length in a note to the 4th edition of Story on the Constitution, vol. 2, p. 387, *et seq.*, and the reasons assigned are substantially as follows: 1. That the appellate powers are of so high and important a nature, that it is "unadvisable" to combine them with other judicial powers in the same person. 2. The ultimate appellate jurisdiction is naturally and legally incompatible with original jurisdiction, except in two cases (affecting ambassadors, etc., and states). 3. The permitting the Supreme Court to sit in judgment and to decide finally on the acts and errors of its own members, may induce the public to believe, that they would be apt to adhere to the decisions of a brother judge, and that "mutual interest had generated mutual civilities and tenderness injurious to right." For the above reasons, the judges were of opinion that the constitution could not have intended that the judges of the Supreme Court should also be judges of inferior and *subordinate* courts, and to "be at the same time the *controllers* and the *controlled*;" that such a state of facts would impair the confidence of the public in the court, which would diminish in proportion as "the Supreme Court might affirm the acts of any of its members."

When the Supreme Court was organized, England, in spite of her errors and oppressions which had caused the Revolution, was still viewed as the mother country, and many of her institutions, acknowledged to be excellent, were admirably calculated to protect individual rights. Hence nothing was more natural than to look to England for models for the organization of our own courts. Our lawyers were at the time acquainted with no other system of jurisprudence than the common law of England, which the Commentaries of Black-

stone had persuaded them was the perfection of reason. Nothing was, therefore, more natural than that the practice of England should be adopted, and as the learned judges of that country held circuit courts, those of America must follow their example. It would be easy to show that the cases were not analogous, and the reasons furnished above, by the judges of the Supreme Court, why it should not be so, appear conclusive, and have never been satisfactorily answered.

But at present there is another and more cogent reason why the judges of the Supreme Court should be relieved from the duty of attending the circuit courts as judges, resulting from the additional labor it imposes on them, as well as the loss of time to which it subjects them, and which can, assuredly, be much better employed in discharging their duties in the Supreme Court.

England, covering an area which in round numbers may be set down at 51,000 square miles, had in the latter part of the last century twelve common law judges in the courts of King's Bench, Common Pleas, and Exchequer, now increased to fifteen. Being consequently inferior in superficial extent to the state of Georgia, which covers an area of 58,000 square miles, there was comparatively little difficulty and delay for twelve judges to attend the six circuits into which the country was divided by Henry the Second, in the twelfth century, and which have since then undergone slight variations.

The judicial districts of the United States are divided into nine circuits, some of which are of vast extent, and it would, we think, be absolutely impossible for the judges of the Supreme Court to attend to the business of that tribunal, were they to preside at the circuit courts held in their respective judicial circuits. Let us, with a view to ascertain what would be the duties devolving on one of them in a given circuit, take as example the Fifth Judicial Circuit, which is composed of Georgia, Florida, Alabama, Mississippi, Louisiana and Texas. This circuit, situated between the 26th and 35th degrees north latitude, and the 2d and 27th degrees west longitude, covers an area of about 500,000 square miles; it consequently ex-

ceeds about ten times the superficial extent of England, and more than four times the area of Great Britain and Ireland, which is computed to contain 120,879 square miles. Now the law requires two circuit courts to be held *in Georgia*, viz: one in Savannah, on the second Monday in April, and one at Milledgeville, on Thursday after the first Monday in November. *In Florida* three circuit courts are to be held for the northern district, to-wit: one in February at Tallahassee, one in March at Pensacola, and one at Jacksonville in December. In the southern district of the same state, two circuit courts are to be held at Key West in May and November. *In Alabama*, two circuit courts at Mobile in April and December, and at Huntsville in June. *In Mississippi*, two courts at Jackson in May and November. *In Louisiana*, two courts in April and November. *In Texas*, two in the eastern district, at Brownsville, in March and October, and at Galveston in May and December; in the western district, at Austin, in January and June, and at Tyler in April and November.

From the preceding statement it appears that there are twenty-two circuit courts to be held in this judicial circuit, to-wit: one in January, one in February, two in March, four in April, three in May, two in June, one in October, five in November, and three in December.² Let us suppose that the judge of the Supreme Court assigned to this circuit should take a fancy to attend each of the twenty-two circuit courts during any one year, it would be a problem of some difficulty to determine how many thousand miles he would have to travel by land and by water, without counting the perils and impediments to which he would unavoidably be exposed, and without solving the question of the utility of such an undertaking. To make the judges of the Supreme Court, in a country like the United States, travel the circuits assigned to them may have been well enough in 1789, but must surely be regarded as preposterous in 1876. Their duties require them to study and understand the legislation and jurisprudence, not only of the Federal government, but of every state in the Union, as well as the doctrines of commercial and interna-

² See Abbott's U. S. Courts, vol. 1, p. 309, 310.

tional law, etc. But all these they are presumed to view in a more comprehensive manner, and from a more elevated point of view, than are usually bestowed on the same subjects by the inferior tribunals, whose judgments they are called upon to revise. Such an undertaking requires indefatigable study, reflection, and access to the best sources of information. These may be obtained in Washington, where the best legal and miscellaneous libraries afford them access to information not to be obtained elsewhere. There, likewise, during the sessions of Congress and the Supreme Court, you meet with the ablest lawyers and statesmen of every state in the Union, and with many distinguished foreigners, from whose intercourse useful information may, at least occasionally, be obtained. Travelling on railroads and in steamboats is a recreation to which the judges, when they attain the eminent stations they occupy, must have been long accustomed, and which can afford them little pleasure, and incomparably less instruction than they could acquire by remaining stationary. But if desirous of being acquainted with the resources of the country, its progress intellectually as well as in the arts, and the pursuits, habits, and character of their fellow-citizens, the vacations of the courts, intended for repose of the mental faculties, might be both profitably and agreeably employed in travelling, without any other object in view than recreation and the repose requisite to resume their judicial functions with renewed vigor. The above reasons appear to us sufficient, even if the constitutionality of the law assigning each judge to a different judicial circuit be admitted, to abolish a practice which is recommended by no corresponding benefit.

By relieving the judges from attending the circuits, additional time would be afforded them to attend to their highly important duties; but this, in the actual condition of affairs, would afford the public a very inadequate relief. The Supreme Court, as now organized, remains in session during seven months of the year, and yet the suits before it are rarely decided within three years from the time the appeal was taken, or the writ of error sued out. This can hardly be

regarded as speedy justice, and that it has a tendency to increase the number of suits in the court is obvious, since the long respite afforded the party that lost his cause in the court below would always be a strong inducement, independent of the chance of reversal, to carry the cause to a higher tribunal. It cannot be doubted that litigation increases with the increase of population ; and hence, it may reasonably be inferred, that the number of suits before the court will be constantly increasing. The change of the law by limiting the appeals, etc., to the Supreme Court to cases where the amount in dispute exceeds \$5000, is not only an act of doubtful expediency and justice, but a palliative which may afford a small temporary relief ; but which, besides setting up a standard of mere money as the exclusive rule for invoking the aid of the highest court of jurisdiction in the country, excludes from its consideration an infinite number of moral and social facts, more justly entitled to the attentive examination of the court.

We have already adverted to the fact that jurisprudence as a *science* has made little or no progress, while as an *art* it has undergone important changes.³ This, as far as the United States are concerned, ought not to excite surprise, because everybody in this country is compelled to exert himself, in the first place, to supply his own wants and those of his family. If a professional man, the attention to the science or art on which he relies for a support occupies his time exclusively, and he has rarely leisure to devote sufficient time to the profound study of the moral and social sciences, and such kindred investigations as are requisite to suggest permanent improvements in legislation and the administration of the laws. The Americans are eminently practical in their views, and if there existed in this country, as in many parts of Europe, a class of men, who, by their position, fortune and previous education, were enabled to devote themselves exclusively to the study and solution of the numerous and difficult problems involved in the organization of society,

³ S. L. R. vol. 1 (N. S.) p. 547.

there can be no doubt that new and useful discoveries would reward their labors.

The present period has been not inaptly characterized as a *mechanical age*, and this appellation applies pre-eminently to the citizens of the United States; a simple reference to the United States Official Gazette of patents granted for useful inventions up to the 28th of December, 1875, shows⁴ that at that date 171,640 patents had been granted, without taking into consideration re-issues of old patents. We may be permitted to doubt if the whole civilized world, beyond the United States, can exhibit an equal number of patented inventions. From this exuberant energy of the Americans in all their undertakings, we think it may be safely inferred, that, when the period arrives for the revisal of their laws, which is probably not very distant, they will display the same energy and practical good sense which has hitherto characterized all their other undertakings.

The age appears to be ripe for undertaking the revision of the laws. Every European state, from North Cape to the Straits of Gibraltar, appears to have felt the necessity of reforming its legislation so as to adapt it to the numerous wants which the improvements in the physical and intellectual condition of modern societies have rendered indispensable. Russia, after more than a century of incubation, has at last formed a code, which in many respects compares favorably with the best of any other country. Sweden has not only reformed her code of laws, one of the oldest in modern Europe, but converted her Diet, in which the nobility, clergy, burghers, and peasantry constituted four distinct estates, into a representative government, composed of a lower and an upper house; and even Spain has engaged with great activity and intelligence in the reform of her laws, and republished her codes, which abound in rich and valuable materials for reforming her laws, and will, probably, eventually form a code superior to any which has hitherto made its appearance on the continent of Europe. The Spaniards are intelligent and acute observers; their ancient indigenous legal literature is

⁴ Vol. 8, p. 1105.

incomparably the richest in Europe, and can be traced back to the fifth century, long antecedent to the formation of the Justinian Code. The *Forum Indicum*, *Las Siete Partidas*, the *Nueva* and *Novisima Recopilacion*, besides many other intermediate codes, furnish immense materials from which, in skilful hands, an excellent code of laws might, and no doubt will, be extracted. The Spanish legal writers do not confine their views to the jurisprudence of their own country, but in the philosophical spirit which ought to guide all true juriconsults who aim at suggesting improvements calculated to produce permanent and useful results, examine the laws of other countries; and they appear to be convinced, with Troplong, that the study "of comparative legislation is the best mode of acquiring a professional knowledge of the great questions which present themselves in the science of the law."⁵

Don Emilio Bravo, a distinguished legal writer on Spanish law, in a work entitled "*De la Administracion de Justicia*," Madrid, 1864, has furnished an interesting outline of the condition of jurisprudence in various countries, especially in Europe, at the time he wrote, in which he criticises with some asperity the administration of justice in England, of which he says, "It is impossible to find a more detestable administration of justice than that which prevails in England, which is only preserved on account of its antiquity."⁶ And he adds that "an English juriconsult, Sir Samuel Romilly, said in 1816, that he had read the codes of all nation, and that the one of England was the worst, being worthy of cannibals,—harsh but correct expressions, which, at the time, led to some reforms, afterwards increased by Robert Peel and Brougham, and which were extensive and also applied to the proceedings in the courts, which have, at subsequent times, been

⁵ Troplong, in *Privileges et Hypothèques*, preface, says, "L' étude de la législation comparée est la meilleure manière d' approfondir les grandes questions que presente la science du droit."

⁶ "Es imposible hallar una administracion de justicia mas detestable que la de los ingleses, quienes solo las conservan porque es antiqua," p. 83.

much abridged, although still wanting in forensic beauty, and even in the necessary clearness and precision.”⁷ We presume that the author alludes to some of the efforts of Sir Samuel Romilly to introduce reforms in the criminal laws and practice of the courts of England; for we believe it certain, that, although in his review of the labors of Bentham he criticised rather sharply the common law of England, he never used any expressions of the kind quoted by Mr. Bravo, as to its civil law.

The second chapter of the work, entitled, “Historico-Critical Sketch of the Administration of Justice in the Ancient and Modern World,”⁸ is well worthy of perusal, because it exhibits great research, and makes us acquainted with the numerous efforts made in various portions of the civilized world, during the earlier parts of the present century, to introduce useful reforms in the administration of justice, as well as in legislation. This spirit of reform has extended even to Turkey, where the Sultan caused to be published the *Tanzimate Kairic*, reviving the old laws of the Kalif Omar, which declares, among other things, “that to do justice is a duty required by God;” “that the judge should decide equitably difficult questions submitted to his decision,” etc., and which further declares “that in future all crimes shall be publicly prosecuted, and that no one shall be condemned to death unless after a regular public trial,” etc. This last innovation, it seems, had met with great opposition in Egypt, Syria, Arabia, and Mecca, where it appears that the silken cords with which the Sultan and his Bashaws formerly expedited their dependents remain in grateful recollection, and are preferred to the more tedious and clumsy inventions of the Christians. It

⁷ “Un jurisconsulto inglés, Sir Samuel Romilly, dijo en 1816 que habialeido todos los códigos de todas las naciones, y que el de Inglaterra era el peor, siendo digno de los antropófagos, palabras duras pero exactas, que arrancaron entones algunas reformas, ampliadas despues par Roberto Peel y Brougham, y que fueron extensivas tambien al procedimiento, que en los ultimos tiempos se ha abreviado mucho, si bien carece de toda belleza forense y aun de la claridad y precision necesarias.” p. 84.

⁸ “Bosquejo historico critico de la administracion de juiticia en el mundo antiquo y moderno.” pp. 24 to 93.

appears that in Moldavia and Wallachia regular codes have also been adopted, which are spoken of as containing remarkable provisions, and many judicious improvements in various departments of the law.

The spirit of reform in the administration of justice which has prevailed on the continent of Europe has at last extended to England, and the Supreme Court of Judicature Act, passed in 1873, and which went into effect on the 2d of November, 1874, is, in its operation, one of the most extensive legal reforms that has been undertaken in that country for centuries. How it will operate practically, is a question which time alone can determine;⁹ but it is admitted to be a work framed after the most mature deliberation, by some of the ablest jurists and statesmen of England, and it appears to have met with the approbation of all classes capable of appreciating the necessity and usefulness of the changes introduced. In a very able and well written article in the *American Law Review*, of January 1st, 1874, will be found an excellent outline of the changes and reforms introduced by this enactment, accompanied by references to the laws of our own country, to which we refer those who desire to obtain further information on this subject. One of these reforms appears to be the

⁹ [A recent number of the *Solicitors' Journal* thus refers to its beneficial operation in diminishing litigation: "It is understood that the new system of pleading is producing one result which we have all along prognosticated. If there is no defence to an action, the present procedure brings out that fact so clearly at the very outset, that the defendant is obliged to come to terms. It is said that this, with other reasons, has something to do with the small entry of causes at Guildhall this sittings. Under the old system a number of technical pleas were pleaded, and the question how far they could be supported was adjourned until the time of trial drew near. The consequence was that plaintiffs suffered great delay in obtaining their rights. Having to state what the facts are upon which the defence relies, is a very different thing from pleading never indebted, and payment and set off. A counsel who saw no difficulty in doing the latter cannot invent facts. We have always admitted that there are very great difficulties connected with the mode of pleading which the Judicature Act has sought to establish, and we believe that those concerned in the development of the new system have found this to be so, but we regard the fact that it breaks down defences in actions

abolition of the anomalous distinctions between courts of law and of equity, which had long created great confusion and conflict of jurisdiction, and which, although abolished in most of the states of the Union, still prevails in the Federal courts, because sec. 2 art. 3 of the constitution of the United States declares that "the judicial power shall extend to all causes in *Law and Equity*, arising," etc.

The tendency of all extensive intellectual movements is to expand, and gradually make themselves felt and acted on throughout the civilized world. In this respect they bear strong analogy to the progress of the atmospheric currents

which ought not to be defended, as a triumphant vindication of what may be termed a natural as opposed to a technical system of pleading. It is not easy to distinguish in practice between pleading facts and pleading evidence, but the difficulties of the process are worth encountering in order to make the pleadings of substantial use towards the adjudication of the dispute. The questions that formerly arose were often as remote from any practical bearing upon the substance of the dispute as could possibly be. If anyone desires an illustration of the working of the old system, we should recommend to his notice the Exchequer Division special paper, as it appears at present at Westminster. We should be afraid to say how many demurrers in cases commenced under the old practice are now directed to stand over until after the issues of fact have been tried. The meaning of this is that it is so uncertain in many cases whether the issues of law that have been raised on paper have any real existence with regard to the actual dispute between the parties, that it is a waste of pains to discuss them until after the trial. Something of the present state of the Exchequer paper may be attributed to the general unwillingness of the judges to decide points of law which may become irrelevant upon the finding of facts, and something, perhaps, to the peculiar unwillingness of the judges of the particular division to make up their minds on difficult questions; but there is no doubt that it was the tendency of the old system to raise issues of so speculative a character that it was quite uncertain whether the decision of a demurrer was of any advantage at all for the purpose of the determination of the real issues. Where a point of law may settle the whole question between the parties, it seems to us most unjust that they should be driven to a trial in order that the judges may be possibly relieved of the trouble and responsibility of deciding the point. But if a system of pleading tends to raise issues which will not really determine anything between the parties, the natural result is that the judges are unwilling to decide them before the trial."—ED. S. L. R.]

of the globe, which, in course of time, produce notable changes on its surface. The constant intercourse between America and Europe has enabled us to acquire a knowledge of the efforts made in the latter country to improve its legislations, and the immense expanse of the territorial possessions of the United States, and the rapid and constant increase of its population have awakened the attention of our statesmen and legislators to the necessity of reforming our own laws and their administration. Congress has accordingly taken the subject in hand; but it appears to us extremely doubtful whether, in the midst of the grave and important deliberations which solicit the attention and occupy the time of that august assembly, sufficient leisure will be afforded it to do the subject justice. In England the subject of legal reform had for many years engaged the attention of its most eminent jurists, but it was not until 1872 that Lord Hatherley, then Lord Chancellor, moved in the matter by introducing a bill for establishing a Supreme Court of Appeals. The present Chancellor (Lord Selborne) introduced the bill which led to the formation of the Supreme Court of Judicature in 1873. Previous, however, to that period, Sir Samuel Romilly, Jeremy Bentham, Sir George Ensar, Lord Brougham, Mr. J. D. Meyer, Mr. Miller, and a host of distinguished publicists and lawyers, had urged the necessity of amending the laws and reforming the administration of justice, and by cogent reasons urged the propriety of such an undertaking. This has, at last, after a century of preparation, since the effort to bring about this result may be traced back to the times of Edmund Burke, been partially accomplished.

In all the countries of Europe preliminary labors, continued for years by the ablest legists and statesmen, have been deemed requisite to enlighten their legislatures to facilitate their efforts to introduce the requisite reforms. It is evident that changes in the law and its administration are extremely grave and important undertakings everywhere; but more particularly in a country of the extent of the United States, inhabited by the descendants of every European nation, organized under a government of which no exact prototype is to be met with in the annals of the world.

There can be no doubt that among the representatives of the states, in the Senate and House of Representatives, many competent men, well acquainted with the wants and wishes of the inhabitants of their respective states, can be found, fully capable of effecting many useful and appropriate changes in the law. But it is not very probable that party feelings, the struggle to obtain appropriations for local improvements, and a great variety of other subjects, which occupy the time and require the immediate attention of the members of Congress, will enable them to bestow that calm, comprehensive, and unremitting care on the investigation of such an enquiry, without which it is not to be expected to prove either useful or effectual. The objects to be effected must be distinctly defined and explained beforehand, and the means by which they are to be effected should be pointed out. These objects and means are undoubtedly best understood by the judges and lawyers, who are in the daily habit of seeing their application and the inconveniences they produce; their opinion should therefore be obtained. To decide correctly and speedily all controversies submitted to the courts are the *desiderata* which the legislators of every country desire to attain. But the attainment of these objects, apparently simple, must be reconciled with other objects, equally necessary and desirable. The speed of the decision must be subordinate to the necessity of affording the parties time to exhibit their respective pretensions, and to adduce evidence in their support, and the mode of doing this in a proper manner, so as not to permit one litigant to obtain an undue advantage over another, or by unjust and vexatious delays impede the prompt administration of justice, requires a knowledge and experience which few men possess.

The science of the law, which interferes with and directs every relation of life, protects the infant ere he has seen the light of day, follows and protects him during his whole existence, and after his demise sees that the disposition of his property shall be properly executed, embraces so many different objects, that no single mind can grasp, or by a concentrated effort form the science. The reason is obvious;

man in his individual relations, those which connect him with his family and his country, his position and pursuits in the community of which he is a member, etc., all impose obligations and duties which he is required to fulfil, and all these vary with circumstances which cannot be foreseen, and consequently, not properly provided for beforehand. To live honestly, hurt no one, and give every one his due, are abstract precepts that vary with the organization of society, its wants, and a variety of circumstances, and to apply them to the multifarious occupations that engage the time and attention of society, can only be provided for by general rules, which in their application are subject to numerous exceptions and modifications.

Congress, it seems, in harmony with the spirit of the age and the wants of the country, has directed its attention to the changes required in the organization of the Federal courts, and until the measures it has adopted for that purpose shall be promulgated, it would be premature to suggest any plan or modification of the existing law.

It is certain that throughout the vast extent of the United States, and in every state of the Union, on the bench, at the bar, in the law schools, and even in private life, men can be found who have assiduously studied the social sciences, and have both a practical and theoretical knowledge of the administration of the law, and the principles of legislation, and whose views can readily be obtained in aid of any useful and permanent reform. It is also certain that if it should be deemed advisable to have recourse to the learned publicists and statesmen of Europe, with a view to compare the actual or contemplated changes in the law with those of its different states and their actual operation, this could easily be obtained, for real knowledge and science are always communicative. We mention this, not because we believe that the suggestions or views of the savans of foreign countries would be of much practical utility, except in so far as they may furnish some new ideas which by the practical good sense of our own learned men may be so modified as to prove beneficial.

We entertain not only the highest respect, but great admiration for the scientific men of Europe, whose labors in every department of intellectual culture have powerfully contributed to the progress of the arts and sciences and the advance of civilization. We think, however, that the Europeans generally, even those who have travelled extensively in the United States, and resided there for years, with a few, very few exceptions, have a very imperfect knowledge of our institutions. For we have known naturalized citizens, engaged in the practice of the law for years, who, either from want of proper study and attention, or from the belief that our government could not, or ought not to differ materially from their own, have never been able to appreciate correctly the real difference between the institutions of the United States and the constitutional governments of Europe.

We may safely, we think, refer to many of our citizens, and even our diplomats who have resided for a long time abroad, for confirmation of the fact that even among the higher and best informed gentlemen of Europe it is rare to meet with a person who has a tolerably accurate knowledge of our laws or institutions.

We have to defer our views of the proper changes in the organization of the Federal courts until we have acquired information of the changes effected by Congress, and we do this the more readily as this communication has already exceeded the space allotted to us in the REVIEW.

GUSTAVUS SCHMIDT.

NEW ORLEANS.

VII. NOTES OF CURRENT EUROPEAN LAW.

(2.)

In substituting the word "European" in the title of these papers for that of "German" employed in the first paper, the writer does not wish to be understood as promising anything like a general survey of so wide a field. Even within the narrower limits of the former title, this would be a much more ambitious task than he ventures to assume. It was explained in the former paper that the purpose was only to notice briefly some of the most interesting decisions of the of the highest courts, and opinions of German jurists as represented in their legal reviews and periodicals. It was hoped then that another contributor would undertake the same office for the legal literature of France. When that hope was disappointed and the editor of the REVIEW requested the present writer to extend his notes to French as well as German law, there seemed to be no reason why a title should not be chosen that would permit selections to be made from any part of the Continent represented by the reports and other periodical legal literature which reaches this country. As nothing like completeness or system can even be attempted in these notes, the less restriction there is upon the writer's freedom of choice, the more hope he may entertain of making them not altogether unacceptable to the readers of the REVIEW.

The Swiss tribunals, for example, as might be expected, have to decide many questions respecting the relations of the cantons to each other and to the federal government, which bear a striking analogy to those arising under our form of government. The following is an instance the bearing of which needs no explanation. We give it in a literal translation, not only because it is so brief that no abridgment could well be made, but still more as an illustration of a style which many of our reporters and writers of opinions could study with advantage. It will be noticed that in a very few words

not **only** are the grounds of the judgment distinctly set forth, but **even** the arguments of the defeated side are sufficiently indicated.

Société Regina Montium v. The Canton of Schwitz. Federal Tribunal of Switzerland, session of Feb. 17, 1875. The laws of a canton may impose a tax upon the capital stock of corporations situated in the canton, although the shares of such stock are taxed under the laws of other cantons, where the owners thereof reside, as a part of the personal property of such owners. The capital stock of such a corporation is not a part of its liabilities, but is rather the property of the corporation. It is therefore taxable, and the corporation is justly liable to pay the tax where it is located, that is to say, where it carries on its business and enjoys the protection of the law. So much, however, of the capital as is employed in the acquisition of real property, is not taxable as personal property: it is the land so acquired that is taxable, and that where it is located. Railroads which have no chartered immunity from taxation may be taxed in the several cantons through which they pass.¹

There is perhaps no system of jurisprudence in Europe that presents more difficulties in a task like the present than the French. Those who are familiar with the history of that law know what a resemblance, amounting in many respects to identity, there was between the principal "customs" of northern France and the English common law in its mediæval form. But the process of divergence which has been going on for several centuries, and the transformation of French law wrought by the Code Napoleon with its civilian terminology, have made the two systems, at least in their surface aspect, totally unlike. The French legal dialect of to-day is so copious, peculiar, and technical, that an attempt to state French cases in familiar English terms, may seem absurd or even offensive to accurate ears. The few following examples must be permitted as an experiment,—to be continued or not as better judges may determine.

¹ *Journal de Droit International Privé et de Jurisprudence Comparée*
Tome II. p. 464, Nov.—Dec., 1875.

Compagnie — Paris — Lyons — Méditerranée c. Combes, Cour de Cassation, Feb. 3d, 1875. Combes, an employee of the company, was sent to couple some cars in making up a train. He was not quick enough to effect the coupling, but had to draw back to save himself, as the cars came together. In doing this he involuntarily put his hand on one of the bumpers, and it was caught and the thumb torn off. There was a rule of the company forbidding the employees to step between the cars in motion for any purpose: but the practice of doing so to couple them was known to and tolerated by the superior officers under whom Combes worked. On these grounds the court of Besançon, before which Combes brought his action for damages against the company, sustained it. The court of appeals, however, reduced the damages in consideration of Combes' own negligence. The company carried the case to the court of correction, but their *pourvoi* was rejected. The point of the decision most striking to an American eye, is the total rejection of the doctrine of contributory negligence. "The company are responsible for their negligence, and it is useless to reply that there was an act of gross negligence on the part of Combes also. His fault does not altogether do away with that of the company, and it is enough that his damages have been reduced on that account."²

To this case the editor of the *Jurisprudence Générale* adds a note which summarizes in very few words the French law upon this interesting subject. "Railroad companies, like all other employers, are not responsible for every accident which may happen to their employees: they become so only when there is some negligence or particular imprudence to be attributed to them. On the other hand, when they employ their servants in difficult and dangerous operations, the companies must secure their safety by all means consistent with the nature of their different employments, and must endeavor to protect them against the results of their own awkwardness and personal faults. See further *Code civil*, art. 1383 n. 84 *et seq.*" The editor also criticises

² Dalloz, *Jurisprudence Générale* 1875, 1me part p. 320.

niously the application of the rule mentioned in the case above. Can an employee be said to step between cars in motion, when he only takes his place before a standing car to couple with it one approaching? *Hazard et Horaest c. Compagnie de l'Est*, Cour d' Appel de Rouen, Mar. 13, 1874.³

This case decides a point familiar enough to American lawyers, but its chief interest is in showing that the technical grounds upon which it is usually placed by our courts are needless, and that it rests upon a principle known to every civilized system of jurisprudence.

By the freight tariff of the French railroads unbleached muslins are carried loose in the cars for a fixed price, which includes the charge for loading and unloading; but at the owner's risk and without responsibility for damage on the part of the company. It appeared that a considerable quantity of muslins so carried had been seriously injured by friction against the projections and rough parts of the car, iron bolts, etc., the cloth having thus been cut and torn. It also appeared that such damage might have been prevented by more careful packing of the cloth in the car, and by covering the projections, bolts, etc., with wisps of straw, as was actually done in other cases. It was therefore held that the company was responsible for the loss thus caused by the negligence of its own agents, whose duty it was to load the cars, in spite of the clause which provided that the cloth should be carried at the owner's risk, "considering that no one can relieve himself from responsibility for his personal fault, since such a stipulation would be immoral and contrary to public policy: and that the freedom from responsibility provided for by the tariff is by no means absolute, but as the defendants themselves admit, applies only to loss and damage not caused by the negligence of the company."

It will be seen that this is precisely the same doctrine with *Lockwood v. The N. Y. Central R. R. Co.*, 17 Wallace, 357, where the Supreme Court of the United States decided that a carrier's stipulation for freedom from responsibility cannot extend to the negligence of himself or his servants; or that

³ Dalloz, *Jurisprudence Générale*. 1875. 2me partee, p. 152.

such an exemption would be against the policy of the law and void. See also *Empire Transportation Co. v. Wamsutta Oil Co.*, 63 Pa. St. 14; *Farnham v. R. R. Co.*, 55 Pa. St. 53; *Knowlton v. R. R. Co.*, 19 Ohio St. 260; *The M. S. & N. I. R. R. Co. v. Heaton*, 37 Ind. 443. But the rule is not without exceptions in this country. In *Poucher v. N. Y. Central R. R. Co.*, 49 N. Y. 263, the New York Court of Appeals sustained such an exemption; and there are other decisions to the same effect. The last case is also reported in 10 Am. Reports, 364, and there is a long note collecting the cases on the subject in the same volume, pp. 366-378.

Veuve Etchevest c. Consorts Galharaga, Cour d'Appel de Pau, Jan. 17, 1872.⁴

This case presents one of the most curious results of the conflict of laws that has fallen under our observation. The French law, as is well known, forbids all "investigation of paternity;" in other words it prevents an illegitimate child from being affiliated on its putative father by any other means than his own free acknowledgment. But a natural child, once recognized as such, has the same rights of inheritance, generally speaking, with legitimate children. In Spain, on the other hand, the putative father may be compelled to recognize his child by a legal process; but if there are also legitimate children, its rights, as against them, extend only to support, and not to a share of the inheritance. The plaintiff had been declared by a Spanish tribunal (the judge of first instance in the district of Pampeluna) to be the natural child of one Antoine Galharaga, a Spaniard, but long a resident of France, whose legitimate heirs were the defendants. A. G. had left property in France as well as in Spain. She brings this action for a share of that property, and the first objection (except some merely technical ones not worth mentioning here) was of course that by the French law she could not be recognized as a daughter or heir. But it was held that this *being* a question of *status*, was properly determined by the Spanish court, the plaintiff inheriting the Spanish nationality of her father; and that the motives which had induced the French

⁴ Dalloz, *Jurisprudence Générale*, 1875, 2me partie, pp. 193-6.

legislators to forbid the investigation of paternity,—that is to say, the scandal which such an investigation must always produce,—did not apply to prevent the mere production of a foreign judgment on that question. The French courts must judge of the *status* of foreigners by the laws of their own foreign state, and the plaintiff must therefore be regarded as the daughter of Antoine Galharaga. As such daughter what were her rights? If these also were to be determined by the Spanish law, her victory would have been a fruitless one, for by that law she could not claim a share of the inheritance. But the question of heirship is a very different one from that of *status*. It is to be decided as to movables indeed by the law of the domicil of the deceased; but as to immovables [real property] the law of their situation governs. Of all the immovable property of Antoine Galharaga situated in France, therefore, the plaintiff was entitled to inherit her share. “It is in vain,” say the court, “to object that the plaintiff, recognized as a natural daughter by the favor of the Spanish law, ought not to be allowed to profit by this recognition any further than that law permits her to do. Such an objection confuses two distinct classes of ideas: one respecting the quality or *status* of the person, the other respecting her right to things; the one regulated by the laws of the country to which the person belongs, the other by the laws of the country where the things are situated,—*lex loci rei sitæ*. Nor can we disregard this well-settled distinction on the mere unproved hypothesis that the laws of Spain only grant the favor of recognition to natural children as a compensation for the hardship that denies them a share of the inheritance, and thus make the latter a condition of the former.”

And so the fortunate Widow Etchevest, by a skilful application of both French and Spanish law, got an inheritance that neither law, taken separately, would have given her!

The application made in the last case of the familiar principle that immovables are inherited by the law of their situation, will perhaps lead the student of comparative jurisprudence to read with more interest a brief account of the

attempt made by the recent Italian code to do away with that rule, and the great controversy which has sprung from that attempt between the principal tribunals of the kingdom. A very full and clear account of it is given by an Italian advocate in a late number of the *Revue de Droit International et de Législation Comparée*.⁵ It is difficult, however for an English or American lawyer to fully sympathize with the enthusiastic praises he bestows upon the very remarkable innovation made by the Italian code, or to regard it as "*une sage et libérale innovation, qui était dans les vieux des publicistes les plus autorisés, et des écoles les plus célèbres.*" In truth we are so little familiar with the conception of an inheritance as a *universitas juris*, a single indivisible entity, which runs through all the systems based upon the civil law, that it may not be easy for the reader always to do justice to the argument presented by the innovators.

The maxim that all rights to things were regulated by the law of their situation,—*lex loci rei sitæ*,—has always been applied to collections of things,—the *universitates* of the civil law,—as well as to things taken separately. It was applied among others to successions whether intestate or testamentary in almost every law of western Europe except the English, which by what we cannot help regarding as a piece of singular good fortune, never was led to apply the conception of an *universitas* to successions. The reason and the results of this peculiarity cannot be discussed here, important as they are in the history of our law. The nearest approach to a *universitas* was in the office of the executrix or administrator; and as he had nothing to do with hereditaments no collision arose. But in the civil law countries, wherever the *universitas* consisted of things lying in two or more different states, the conception and the maxim above quoted were of course inconsistent. With regard to movable property (including credits, etc.) the difficulty was peculiarly liable to occur, and at the same time was easier to deal with. Hence the early introduction of the fiction that all moveable property

⁵ Cesar Norsa. *Revue de la Jurisprudence Italienne en matière de Droit International*. *Revue de D. I. et de L. C.* 1875 No. II, pp. 206-228.

was in the domicil of the owner, and of course governed by that law. *Mobilia ossibus inherent*. The fiction was soon extended from the law of succession to other branches, and for centuries has been the uniform rule of personal property, until in our own day and country we see exceptions to it becoming gradually established. But this fiction could not be extended to the immovable [real] property without interfering with the control which each government jealously asserted over its own territory. So long as the disability of aliens was maintained, there would be comparatively few cases of an inheritance scattered through several states and there was little reason to change the law on their account. Hence for centuries there has been a recognized double rule. However widely the things belonging to a succession and constituting the *universitas* might be scattered, all the movables were governed by the law of the domicil of the decedent; the immovables on the other hand belonged to that *universitas* only if they happened to be under the same law. If situated in other states each constituted a succession or inheritance by itself governed by its own law. *Tot sunt hæreditates quot sunt loca diversis territoriis obnoxia, in quibus sita sunt bona.*

There always indeed were some theorists who insisted that this was illogical. Admitting that immovables, separately considered were subject to the law of the place, they argued that this had no application when they become part of a juridical unity, or inheritance. To open different successions in the different countries was to break that unity, to destroy the *universitas juris* and consequently the entire succession. Some very good authors maintained that an inheritance must always in the very nature of things be a single entity, governed by a single law, that of the decedent's domicil; and that it was just as wrong and unscientific to depart from this principle in the case of lands as in that of movable property. They succeeded at last in introducing their doctrine into the new Italian code of 1866.⁶

⁶It is stated by Signor Norsa that a similar provision had previously

The authors of that code were by no means ignorant of the great change they were making in the law of Italy, or disposed to underrate its probable influence upon the rest of Europe. The members of the code-commission announced it as a "new and more rational principle,"—"a reforming and beneficent truth,"—and expressed their wish that the government should take diplomatic means to induce other nations to accept it. "It was received by the lawyers," says Sig. Norsa, "with lively satisfaction, as more conformable to right reason, to universal law, and to natural equity, and as marking an important step forward in [private] international law. The American lawyer may smile at some of these expressions applied to a dry question of legislation, but he may also well consider whether they diverge as widely or as dangerously from the golden mean of sound, practical wisdom on the one hand, as do on the other, the indifference of our bar and people to the annual tampering with our laws by every legislator whose caprice or whose interest move him to the task.

The new rule is contained in the eighth preliminary provision of the code, which may be translated as follows: "Successions, both legal and testamentary, so far as they concern the order of succession, the measure of the rights transmitted and the intrinsic character of the dispositions made, are regulated by the national law of the deceased, whatever may be the nature of the property, and in whatever land it may be found." Well indeed may Sig. Norsa say, that if this rule were to remain solitary and without echo from other nations, its application would meet very great and perhaps insurmountable difficulties! Experience has shown already that so bold a change could not be made without difficulty even within the limits of a single state.

The Court of Cassation at Naples, indeed, decided,⁷ in carrying out the purpose of this section, that the successor of a deceased foreigner must be governed by the law of his own

been introduced into the law of Belgium by a statute of July 9, 1864. I have not at hand the means of examining this statute or learning what effect it has had.

⁷ *Annali Guerispr. italiana*, vol. IV., T. T. 49, Nou. 30, 1869.

nation, even as to real as well as personal property situated in Italy. But the Court of Cassation at Turin has decided differently. It has set aside⁸ (*cassé*) a judgment of the Court of Appeals of Genoa which had followed the Neapolitan decision in holding that the succession of an Italian subject must be governed by Italian law, even when it consisted of land situated in a foreign state. It has based its action upon the impossibility of carrying into effect any such judgment respecting lands in another state. "Courts should not and cannot render judgments which they know beforehand cannot be executed, for such judgments would be mere academic resolutions devoid of all practical value. The section in question can be regarded only as an invitation to other nations to extend the principle of reciprocity." "There has been an animated discussion," say the court, "in the domain of doctrine, whether it is more conformable to reason and the principles of legal science that a succession should be regulated by the law of the decedent's domicile, or by the law of the place where the lands comprised in the succession lie. The best authors have differed upon this question; but as a matter of fact, by the international law accepted in Italy and throughout Europe, it has always been held that the application of the personal law of the deceased is limited to the movable property, and that with regard to immovables, there are as many distinct successions as there are states in which lie lands belonging to the succession."

"Considering that the opinion, by which the patrimony as an ideal entity (*universitas juris*) is incapable of separation from the person owning it, and is therefore so identified with the person as to be equally incapable of subdivision with the person itself, has never up to this time emerged from the domain of doctrine, and that sec. 8 of the preliminary provisions of the code is the first attempt that ever has been made to reduce it to practice: that the Italian legislator, in being the first to adopt a principle so liberal and generous, (as it was termed in the report of the code-commission,) was giving, as

⁸ *Annali Guerispr. italiana*, vol. IV. 2, 405, April 11, 1870 (the judgment at Genoa). *Ibid.* vol. V. T. T. 385 (the judgment at Turin reversing it).

he expressly said, to the civilized world a noble example and perhaps a stimulus, we may infer that it was an example and stimulus only that the legislator intended, and nothing more. He could not have meant, and he certainly had no power, to impose upon other states so bold an innovation, for which, as the mover himself remarked, there was as yet no precedent, and which was in contradiction with the rule heretofore universally admitted: *tot hæreditates quot territoria*. The Italian legislator was indeed free to adopt a foreign law; but to assume to impose the Italian law upon a foreign state is a proposition the very statement of which is its refutation."

Another controversy, or to speak more accurately, another branch of the same controversy has arisen under sec. 94 of the Italian code, which provides that when a succession takes place out of the kingdom all actions respecting the inheritance shall be brought before the tribunals of the place where the greatest amount of property is situated, and in default of such place, before the tribunals of the defendant's domicil or residence. But the Court of Cassation at Naples, holding firmly to the theory of the absolute unity of every succession, has decided that every action relative to a foreign succession must be brought before the courts of the foreign country even when the property in question, movable or immovable, is situated in Italy; and that the Italian courts have no jurisdiction in such cases. The decision is a mere application of the principle already stated; that the succession is to be regarded as forming a *universitas juris*, a moral entity, comprising all the property and all the rights and credits of the deceased, but having an existence of its own independent of the property, rights, etc., which compose it.

The same question coming before the Court of Cassation at Turin was heard with unusual care, all the sections of the court sitting together for that purpose;⁹ and here again they came to a conclusion diametrically different from that formed at Naples, affirming the jurisdiction of the Italian courts. It will not be necessary to state the grounds on which these opinions were based, since the reader will see at once their

⁹ Jan. 30, 1874. *Giurisprudenzia*. An. XI, p. 321.

connection with those quoted above. The whole controversy indeed, as it appears to an American eye, may be stated in the following form: Admitting that the civilian view of a succession as *universitas juris* is the true one, is it possible to carry this out to its perfect theoretical result, in the absolute unity of a succession embracing property (and especially landed property) in several different states; or does the independence of each sovereign state, and its necessary control over its own territory, require that the rule *tot hæreditates, quot territoria* be maintained at the cost of a theoretical inconsistency? But an American lawyer will hardly be able to consider the subject without asking himself whether the first admission, upon which the whole controversy rests, is a necessary one. Is there any need, practical or scientific, of considering a succession, even within the limits of a single state, as an indivisible unity, *universitas juris*? May it not be regarded as a fortunate loss which has removed the entire doctrine from the common law, and saved English and American jurists from the infinite labor and perplexity which the proper location of the law of inheritance in their systems has cost their continental brethren? We do not presume to answer these questions, we only suggest them.

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VIII. BOOK REVIEWS.

THE INSTITUTES OF JUSTINIAN ; with English Introduction, Translation, and Notes. By THOMAS COLLETT SANDARS, M. A., Barrister at law, late Fellow of Oriel College, Oxford. First American, from the Fifth London Edition, with an introduction by WM. G. HAMMOND, LL.D., Professor of Law in the Iowa State University. Chicago : Callaghan & Co. 1876.

This work is timely and acceptable. Readers who have already procured the fifth English edition, and who have learned to properly estimate its value, will be glad to see the work in an American dress ; and if its republication here shall have the effect to bring it to the consideration of a larger number of students, the benefit to the profession will certainly be great. Few books of the law contain so much that is permanently valuable. The old work is always useful. It fitly sums up in a small compass much of the wisdom which was accumulated by the patient labors of ancient jurists during a thousand years ; for it was about that period which elapsed between the law of the Twelve Tables and the publication of the "Eternal Oracles" of Justinian. At the beginning of that period the law was to be found in a comparatively small number of precepts of general application, and the discretion of the judge was almost as ample as his jurisdiction : at its close the books of the law could hardly be numbered. The marvellous fecundity of ancient law writers might surprise even the present age, which has added so immensely to our stores of legal lore. We can have but a poor and inadequate conception of the countless number of law books in existence at the time that the compilations of Justinian were made. Labeo, a celebrated lawyer of the Augustan age, could hardly have been an idler. We are told that although actively engaged in the public exercise of his profession, he left behind him four hundred books on his favorite science, the fruit of casual intervals of leisure. Of his great rival, Capito, the founder of a hostile school, the two hundred and fifty-ninth book is expressly cited ; and whether this was the last of the series we have no means of knowing. There was no end to making law books ; but as they increased the harmony of the law was diminished.

The clash of authorities liberated the principles involved ; the judge found a support for any ruling ; and once more his discretion became almost as wide as his jurisdiction, too much law producing substantially the same effect as too little. Books were too abounding for practical use ; it required large wealth to buy them, and life was too short for their perusal. Under these circumstances the law drifted steadily toward chaos and confusion. This was the effect of an active civilization stimulated by unusual surroundings. It has been supposed by many that our law is taking the same course. That there are certain analogies between the two cases may easily be seen.

Long before the days of Justinian the almost boundless expansion of legal literature, and of the laws themselves, had become a sore subject to all classes of men who were anywise concerned for the correct administration of justice. During the last years of the Republic Cicero, Pompey and Julius Cæsar, each projected a general compilation of the laws of Rome. The former actually did something towards the execution of the prodigious design ; the troubled days and untimely deaths of the latter two left the work unaccomplished. Imperial resources permitted Justinian to perform the work which they had contemplated. Few perhaps would have remembered that it was during his reign that the Mosque of St. Sophia was built, or that the silkworm was then first brought to Europe, or the victories of his one successful general, but his collections of the laws of Rome have made his name as familiar as those of the greatest of the rulers who presided over the destinies of the ancient world.

It is through these collections that the Roman law has for the most part been made accessible to us. That law is the mightiest relic of almighty Rome ; it does not exist "in ruinous perfection" like much that marks her former grandeur ; we have it in a singular state of completeness ; and its vital principles still exert their influence as an important element of modern progress. Wherever the Roman eagles were borne traces are to be found of the laws which they came to establish. Northward and to the far northeast where the Roman legions rarely or never penetrated, and beyond the seas, in the east and in the west, where only the poetic vision of Seneca perceived the possibility of new worlds, the Roman law has silently diffused itself. It has amalgamated itself with systems which it could not subdue ; and as it supplies the finest medium for the study of comparative jurisprudence in all

countries, the continual and diligent attention which is given to it tends perpetually to diminish the conflict which exists among the various systems of laws prevailing in different nations. Everywhere its principles are cited, and everywhere it is referred to as a common standard, if not of what the law is, at least as to what the law has been approved to be by a succession of the greatest jurists that the world has yet beheld.

The geographical limits of the dominion of the civil law as it now exists could not be defined with any tolerable accuracy. It has been said that the universality of the Roman Empire when she fell was succeeded by the universality of the Catholic Church ; but long before that time the veil of the church had been rent by the schisms of the East and West. If any such symbol of universality survived it was to be found in the jurisprudence of Rome. But little, perhaps, is known of the laws that govern the countries of the East ; but it is said that the laws as compiled by Justinian, and afterwards by Basil and Leo, known as the Basilican Constitutions, have been there handed down, with many modifications, and that the jurisprudence of the East is based on their essential distinctions.¹ This, on the whole, would not be very surprising, for these ancient laws contained whatever was most useful to perpetuating governments depending alone on the will of a single ruler. And although on the taking of Constantinople the victorious Saracen, disdaining the code of a vanquished people, issued a proclamation formally abolishing the civil law, yet the power of the sword which he wielded could only be of occasional use, whereas the manners and habits of the people, being well nigh indestructible, would continue to operate with the unspent and accumulating force of ages. In modern times the Russians have borrowed the civil law as a part of the civilization which they received from the neighboring nations of Europe where it prevailed. In those countries of Europe where the Roman power was firmly established, the Roman law entered into the laws and customs which succeeded the downfall of the Empire. It was the foundation on which everything was built. This has been very clearly shown by Savigny in his "History of the Roman Law during the Middle Ages." The

¹ The French in Algeria have come into direct contact with the Mahometan law, and have been compelled to give it practical attention. Their researches seem to bear out the suggestions here made. See *Droit Musulman, du Statut Personel et des Successions, par MM. Santayra, Conseiller a la Cour d'Alger, et Cherbonneau, Ancien Professeur au College Arabe-Francais d'Alger. Paris, Maisonneuve et Cie., 1875.*

Romans occupied England for about four hundred years, during which their laws and institutions must have taken a pretty deep root among the people. As to how far these modified the common law of England is a question of great difficulty; but it is generally admitted that they had a considerable influence upon the subsequent development of the laws of ancient England. A general summing up of the facts as they bear on this question will be found in the Introduction of Mr. Finlason to Reeves' History of English Law. The extent of that influence in any country where the Roman law was formerly established must of necessity be a problem too deep for our philosophy; for if we could separate the elements which enter into the composition of the later laws, and restore to the Roman law what would be its own, we should still be so far from its solution that we should have no criterion by which to estimate what the Roman law had displaced, and what it had prevented from coming into being. On the whole we can only say that the civil law has qualified to some extent nearly every system of laws prevailing at present among enlightened people. Such has been the wonderful catholicity of that law that it has adapted itself to republics and to monarchies, to countries where the power of the papacy was pre-eminent, and to countries where the authority of the church was denied; nor has there been discovered any incompatibility between it and the infallible precepts of the Koran.

That there must be much of merit to account for such extensive results could hardly admit of doubt, especially when we consider the vast number of laws which have fallen, and are daily falling into oblivion.

But in what does the peculiar merit which has been crowned with such splendid success consist? So much has been said of the superiority of the classification of the Roman law that a notion has grown up among many that its arrangement was well-nigh perfect. Prof. Hammond points out this error in his very able and interesting Introduction to the work before us, and says:

"That the single laws passed from time to time during the period of the Republic, with the decrees of the Senate, and Imperial constitutions, that afterwards successively took their place, were not constructed on any scientific plan, but owed their form in each case to the exigencies of the occasion, as a modern statute does, can hardly require proof. It will be sufficient to show that even the more important collections of law, the Twelve Tables, the

Perpetual Edict, the Digest, and the Codes of Justinian, were equally destitute of scientific order."

Perhaps it is owing to the fact that the laws were made to suit the exigencies of each particular occasion as they arose that these codes have been found to be practically very useful. Systems of laws elaborated in a closet have always proved to be failures in their application to the actual wants of society. As great a man as Locke could not produce from out his philosophy even a fundamental system of laws for South Carolina that was capable of being reduced to practice. The Romans learned to make laws as they learned to build houses and ships. It was from the house that fell that they learned to build a house that would not fall ; it was from the ship that sank that they learned to build a ship that would not sink. During the thousand years that preceded Justinian they had experienced perhaps more striking and extreme vicissitudes, had suffered from more conflicts, both internal and external, than have ever fallen to the lot of any people in a like period or time. By frequent and sudden wrenches the sufficiency and efficacy of every legal principle were often put to a severe test. The result was that weak and inadequate laws gave place to those that were stronger ; stronger not in the power through which they might be enforced, but stronger in the sense that they were better adapted to carry moral conviction with them, and thus to assert themselves in the approbation of men ; for it is in something like this that the true strength of the laws must consist. Every other kind of strength is extrinsic and accidental ; but this is inherent. The frequent internal commotions of Rome left the laws no other kind of strength in the long run than that which they contained in their own fitness for the government of society. Extensive trade and commerce, an eager and restless civilization, boundless conquest, fabulous wealth, and yet withal, violent outbreaks, sudden and immense calamities, desperate reverses, alternations of famine and plenty, presented an innumerable variety of relationships in business and social life, and produced a corresponding expansion of the laws to meet so many and such opposite exigencies.

It has been often remarked that every nation has a peculiar genius of its own : that of Rome was essentially military ; but accompanying this was a genius for the law equally marked and unmistakable. That of Greece for the arts and for literature was hardly more undoubted. The annals of Rome are filled with legal ques-

tions which interested or distracted the people. It was this spirit that made Rome what she was. She might have made extensive invasions like those of Attila or Alaric, mere transient paths of destruction, like that of a pestilence, leaving no lasting effects ; but to consolidate an empire, and to preserve for two thousand years a predominance over a vast number of unruly and discordant people, required the highest law-making faculty. Added to this faculty, or as a part of it, her eclectic philosophy, and her ample toleration of ideas, were of the greatest value in helping onward the development of her laws. The Romans have been accused of a want of originality, because they borrowed their literature from Greece : let the charge be allowed ; but let it be added that no people were ever more willing to learn ; there was something original in that. They were as willing to receive new ideas from others as they were to adopt strange gods into their pantheon. The greatest advantage that is claimed for the study of comparative jurisprudence is that it enables us the better to understand our own system of laws. It has been asserted that no one can well understand his own language without a knowledge of some other language. Genius has its bright and particular exceptions. The greatest master of this tremendous English tongue of ours that has yet been clothed in the flesh, was one who knew " but little Latin and less Greek." But as we judge all things by likeness and unlikeness, and by the constitution of our minds cannot do otherwise, the value of some extraneous standard or standards of comparison in the study of most sciences must be admitted. The Roman lawyer had many opportunities of making comparisons between different systems of jurisprudence. The far reaching sovereignty of Rome embraced many nationalities, each having a code of laws more or less peculiar ; and in the court of the *Prætor Peregrinus* these laws all had to be expounded. It must have been from a broad survey of various systems that the Roman jurists derived their ideas of the *jus gentium*, that substratum of law which is to be found in all codes. They discovered that the practical needs of humanity everywhere are much the same ; that everywhere there must in the nature of things be agencies, suretyship, bailments ; everywhere there were tutors, husbands and wives, successions. A comparison of the legislation, the customs, by which these matters were regulated must have suggested improvements in their own laws ; and greatly accumulated objects of legal contemplation must have increased and enriched the province of legal

thought. We may flatter ourselves that in this respect the position of the Roman lawyer was not wholly unlike that of the American lawyer. With the various systems of our different states, supplemented by that of the federal government, the latter finds the study of comparative jurisprudence a necessity. All our text books are studies of comparative jurisprudence; and there is hardly a case tried in our courts but what involves the nice weighing of decisions based on systems of laws that, in some respects pertinent to the matter in hand, will be found to differ. Our study of analogies is therefore frequently exceedingly complex; and we are compelled to elucidate the complexity by laborious reference to remote principles. There is no doubt but that there is required of the American lawyer a much more varied culture than is required of lawyers anywhere else; and it may be due to this enforced study of comparative jurisprudence that the jurists of our country have achieved a distinction abroad far brighter than has been attained by the labors of our countrymen in any other walk of science.

If the classification of the Roman law excels that of the English law, as many have thought, it was perhaps not on account of any special qualification of the Roman mind for that kind of work. It might almost be asserted that the peculiar talent of the Roman mind for constructing laws, well and skilfully adapted to meet actual wants, precluded it from reaching any great excellence in the subordinate, but not less profound, labor of classification. The mental qualities required for these two departments of study are not identical, and they are probably to some extent hostile and inconsistent. There is nothing more astonishing in the remains which we have of Latin literature and language than the evidence which they afford of the want of introspectiveness of the intellect of the people of Rome. Everything to them was objective. The very poetry of Rome formed no exception. Borrowing the Greek philosophy Rome added little or nothing to its compass or depth. The law was made, as Prof. Hammond says, piecemeal, only to meet some actual want; and no law was made until the want arose; and if it was found to meet the want, there was an end of the matter for the time. That there was after all a certain system about the law was due greatly to the fact that there is a necessary order in human affairs, and that this order will be reflected in a system of jurisprudence which severely conforms to all outward circumstance. That this casual classification will not be so accurate as one based

on scientific study will of course be conceded. Hence the Roman law is regarded as being defective in that respect. That the classification of our own law is not more satisfactory may probably be ascribed to the fact that it has been borrowed from the Roman law, and has been spoiled in the borrowing.

We have spoken of the wide dissemination of the civil law as being a token of its merit; but—to fairly state the matter—it must be granted that this result has been due, in a large measure, to other causes. On the revival of jurisprudence there was an active propaganda established in its behalf. A zeal akin to that of religion was enlisted in its favor; indeed the missionaries of religion became everywhere the apostles of the civil law. It was the last of the crusades. A universal church, a universal system of positive law, attracting the minds of men perpetually towards Rome, as to the eternal centre of earthly affairs, and of hopes that tend heavenward, the substitution of the Papal for the Imperial crown, such was long the cherished dream of ecclesiasticism, at a time when ecclesiasticism embraced nearly all the learning, a great part of the virtue, and most of the moral influence that existed in the world. That there was an admixture of selfishness and priestcraft in the effort to realize this dream, it would be as vain to deny as it is to assert that the clergy did not truly regard the diffusion of the nicer equities of the civil law over the rude populations of Europe as a probable means of educating the people into a higher and better civilization. For the rest M. Guizot accurately says: “You can easily conceive that an ardent attachment for the Empire was preserved in the bosom of the church. Accordingly we find that it tenaciously adhered to what remained of it, to municipal government and absolute power. And after she had succeeded in converting the barbarians she endeavored to resuscitate the Empire; she addressed herself to the barbarian kings, conjured them to make of themselves Roman Emperors, to enter into the same relations with the church as those which the Roman Empire had sustained.”²

Truly the clergy had had a hard time with these barbarians; and we can not much blame them if they recurred with pleasure to the warmth, splendor and pomp of the Roman Empire; when money was poured out like water, when an Imperial constitution condemned and extirpated a heresy; when elegance and taste still found a home in the world.

² *Histoire de la Civilisation, Sixieme Lecon.*

Under the active patronage of the church the expansion of the civil law was rapid and wide. The Lombardic and Milanese customary laws in Italy, the Gothic codes in Spain, yielded before it ; in the South of France it took quick root, and eventually it made its way in the North of France ; in Germany it met with a prompt reception. But far away from Rome, in the unfrequented places of civilization, the impulse died away like an expiring wave. Insular Britain, and semi-insular Denmark, Norway and Sweden rejected the profered gift. Venice, too, strong in her commercial customs, the germ of so much of the law that is of purely modern origin, refused the Imperial codes. The civil law was first brought over to England by Theobald, a Norman Abbot, elected Archbishop of Canterbury in 1138, and who caused a school to be opened in Oxford for instruction in its doctrines. Not being found acceptable to the people, it made small progress. Ten years afterwards King Stephen issued a proclamation forbidding its study in his dominions. Still the clergy kept up the struggle ; but they had but little success. They complained that the ignorance of the people was too dense to allow them to perceive the superior excellence of the law which was thus commended for their adoption. Nearly everywhere else the world seemed to have been waiting for its coming ; but here there was a kind of persecution against all who gave countenance to the novelty. It was easy to demonstrate that the civil law was a more refined and elevated code than that by which the realm was governed ; that it was more in accordance with reason than the rude customs which had grown into law, many of which were unaccountable, and many of which were oppressive and absurd. It was all in vain. The civil law had but few advocates out of the priesthood. The Barons declared that they would not change the laws of England.

And the Barons were right. The civil law was indeed beautiful ; but its beauty was that of a corpse. The splendid soul that should inform the law was not in it. It protected everything but that which most needed protection. The word "slavery" was written all over it. The law had no foundation but the Imperial will ; and that will was emancipated from all earthly control. It carried the mind back irresistibly to that day when Theophilus exclaimed in the court of Justinian, "what interest or passion can reach the calm and sublime elevation of the Monarch? He is already master of the lives and fortunes of his subjects ; and those who have incurred his displeasure are already numbered with the dead."

SANDARS' JUSTINIAN.

True it was that the common law was full of false and unmeaning technicalities, having no proper place in the science of law; but there was one thing about which the common law never dealt in technicalities. There was one thing concerning which the common law spoke in language too plain to be misunderstood. No one ever doubted what its import was as to personal liberty. Only knaves could affect to doubt. There were the rude Latin phrases of the Magna Charta, which have been pronounced to be worth all the classics, which still ring out in our American constitutions like the sound of the trampling of armed men, and which have gained nothing in clearness by the lapse of ages, or glosses of the commentators. It is true that in a more refined period it might have been possible to adopt only so much of the civil law as should not be in conflict with the principle of personal liberty which made a part of the common law; but the task was too delicate for a people unused to the intricacies of law-making; and they naturally made up their minds that it was the love of absolute power that led men to favor the civil law, since absolute power was one of the most fundamental elements of the composition. It may be that this rejection of the civil law was only the work of blind unreasoning prejudice. If so, it only affords one more reason for saying that men are often better guided by their prejudices than by their understanding. The effect of the civil law on the Continent in subordinating the liberty of the citizen to the will of the ruler is conspicuous. The internal history of France prior to the Revolution is simply a history of the continual decline of individual liberty. And in other countries the influence of the civil law was exerted in the same direction. It was inevitable, for the civil law in every line and syllable indicated the duty of unlimited obedience to the prince.

Although the clergy were baffled, yet they were not wholly discouraged. Finding that they could not overthrow the fabric of the common law, they set themselves at work to sap its foundations, to add to it from the abounding quarry of the civil law. Having control of the ecclesiastical courts, and of the high court of chancery, they introduced into their rules the principles of the Roman law, pretending not in any respect to supersede the common law, but to give decrees in accordance with the doctrines which it professed, where the common law, by reason of its universal character, was deficient; being careful however not to name the civil law of any binding force. It was thus that the decrees of the chan-

lor superseded the edicts of the *Prætor*; and that our laws came to have a duplex character unknown in any other part of the world. In this respect the labors of the clergy were undoubtedly attended with the best of consequences, although the final result is to produce an awkward anomaly. The common law was too narrow to meet the requirements of a growing and progressive people. Its principles were hard and unyielding. It was only the better part of the civil law that the courts of chancery could adopt; for their own existence was for a long time precarious; and it was only by adherence to what seemed fair and just that they could maintain and secure that public favor which was essential to their very being. The court of chancery was however continually engaged in smuggling the principles of the civil law into the realm. For a long time these principles were confined in their operation to the courts in which they were first received; but in the course of time the common law courts borrowed the principles which had been received in chancery, and thus the whole common law system became strongly impregnated with the doctrines of the civil law, until it has become difficult for us to say definitely in all cases where the common law begins and where it ends, so completely are the two systems blended into one. That an assimilation of our laws to civil law principles is still going on, is most apparent. Of this fact the abolition of the old common law system of pleading in England and in this country, in favor of that of the civil law, is a striking evidence. When ancient forms in the law disappear, we may be sure that much of the substance has previously given way. There is however a serious difficulty in accurately measuring the intentional approximation that is taking place, and that has taken place between the common and civil laws. Whatever may be said of the civil law, it must be generally admitted that it attempted to base its distinctions on outward facts, and not on strained theories; also that its peculiar excellence consisted in its adaptation to the wants of the people for whom it was provided. Now it frequently happens that in throwing off some obsolete or unmeaning technicality of the common law, our laws become from that mere fact more like the civil law, and yet not through any specific influence of the civil law. We have simply torn down an irregular tower of an antique building, which causes the building to look more like another building that has not that particular irregularity, though without having any design to produce that resemblance. For instance, the abolition of the scholastic and syllogistic system of pleading of the

common law causes our present system to be the same as that of the civil law; but this is possibly because the common law pleadings were highly artificial, and upon their abolition the pleadings of the civil law came into place because they are the simplest and most natural form of conducting a written controversy; and are nearly such as will always be used where no artificial system is prescribed.

The great conflict between the common law and the civil law has brought about the most beneficial results. Time has done what the wit of man could never have achieved. We have at last adopted a large part of the civil law; and that part is the best part. It is from the specimens of our adoption that men often infer the perfection of the civil law in a very mistaken way. The parts of the civil law that we have not adopted are doubtless worse, if possible, than the part of the common law that has been, in the course of a few hundred years, rejected, and which most people now look on with just horror. Thus it is that what is best in each system has survived the conflict, and what was worst in each has gone down. By the infusion of civil law doctrines the common law has become more reasonable, possessed of a milder equity, and has been endowed with a more delicate sensibility. But the distinctive principle of protection of personal liberty has in nowise been lost or diminished. On the contrary, the doctrines proclaimed by the Magna Charta, and the right of trial by jury, have been wafted, as if on the wings of the morning, to many lands where the civil law reigned in ignorance that such things could be; and they are yet destined no doubt to make the complete circuit of the earth, and to survive as long as the condition of man in the world shall remain free from any fundamental alteration.

Prof. Hammond notices the controversy of Mr. Austin with Blackstone, and it is evidence of his fairness that he inclines to take sides with the latter. The strictures of Austin upon Blackstone have lost much of their force by reason of the asperity of their utterance. The animosity against the great commentator which had slept since the days of Junius, seemed to have awakened again into life. The savageness of these assaults is truly deplorable. But herein, perhaps, Mr. Austin approved himself a true civilian; for the contentions of civilians have been too often marked with bitterness: but on the whole, the fault of Mr. Austin in this respect may charitably be ascribed to the natural but momentary peevishness of the overworked scholar. That the disciple of Bentham, the born reformer, should not have been one of the greatest of the

admirers of the placid commentator, who saw in the laws of England scarcely blot or blemish, is what would have been expected ; but we should hardly have conceived that the antipathy of his censure could have blinded him to the real and undoubted merits of Blackstone, which to a large extent were not involved in the grounds of his censure. He could not pass over the error of Blackstone in translating "*jus rerum*" into "rights of things," instead of "law of things." Yet in this Blackstone only copied from Hale, in regard to whose faults Austin was always lenient. He dwelt on this and other like trifling errors in Blackstone with an apparent satisfaction. But Blackstone and Austin are not contradictory, and there is no more reason that we should be partisans of the one or the other, than that we should be Tribonians or anti-Tribonians. If Blackstone prided himself on his classification, he has nowhere indicated that feeling. Doubtless he did not consider his classification as being ultimate or perfect. No admitted perfection has yet been reached in that direction ; but we think that the labors of John Austin have tended that way. It is more easy to underrate those labors than it is correctly to weigh their merits. The subject of which Austin largely treated was a perilous one. Almost anyone may assume to change the substance of the law, as we see daily ; but the classification of the law is a different thing. The law will be the same however it may be arranged. A new classification might conduce to clearness of conception ; it might greatly lessen the labors of future students ; but we of the present generation have learned from the old books, which we are not willing, and can hardly afford to discard. As to how far we are willing to sacrifice ourselves for the benefit of posterity, might be a nice question. We are no doubt willing to write books, if we could, and to erect monuments which would affect them with surprise and admiration ; we are not wholly unwilling to issue bonds for them to pay ; but when it comes to adopting a phonetic alphabet, or a decimal system of weights and measures, or a new classification of science, for their benefit and to our own inconvenience, we are constitutionally reluctant ; however freely we may admit that such changes would be for the better. It seems to us that no calm and dispassionate student would deny that the distinctions of Austin as to the law of *status* and the law of things, and the rights that avail as against an individual, or a determinate number of such, and rights availing against the world at large, are founded on

und and accurate conceptions of the law as a science. It also be granted that he has better succeeded in drawing the distinction between law and morals, and in defining the science of jurisprudence with precision, than any writer who preceded him. After all, what he left behind him was made up of fragments, roughly and provisionally put together; mere preliminary essays of the larger work which he contemplated. Neglect chilled his enthusiasm and checked his purpose.

It is probable that under more favorable auspices the result would not have been very different. Ever curious and questioning, he was every Hamlet of the law; and he would probably have required an unconceding destiny at least five hundred years for working his system into a form that would have met with his own approval. As it is, his influence has been great, and is likely to be greater hereafter. To profound thought he added profound scholarship, and a capacity for the most soul-subduing labor; while for intellectual honesty he excelled Aristides the Just.

Prof. Hammond, in vindication of Blackstone, asserts that he was a fair civilian after the fashion of the eighteenth century. Not that it was from the civilians that he learned to treat the law in a philosophical spirit, and to clothe it with the elegance of polite literature. There can be no question but that his studies in the law were of the greatest profit to himself, and that they have been of extensive advantage to his readers. That he was a profound civilian has never been claimed. It seems to follow hence that some knowledge of the civil law will be found to be profitable to the profession that has to do with the English law. That the more lawyers should ever be thoroughly acquainted with the great body of the civil law is manifestly not possible; but it is not a very difficult task to become acquainted with its general principles; and perhaps the rest is to the generality not of much consequence. An elementary work could be better suited to our wants in this respect than the present. Written as an elementary book of the Roman law, none of the kind has ever been more happily executed. Everywhere it exhibits the scholarly genius of Tribonian, the master of the Latin and Greek literature, versed in all the ancient books that have been preserved to us, and in all the books that we can never see, and which disappeared in the baths of Omar; a man who was himself the author of many books both in prose and verse, and who for the wide reach of his knowledge, as well as for his other glorious qualities, has often been compared with Lord Bacon.

Everything which art could do was done to make this book entertaining as well as instructive; nor has its interest been lost, though it may be less attractive to us than to the Roman youth for whom it was intended. As a book Mr. Sandars' edition is perhaps as near perfect as such a work can be made. Its brilliant success in England is proof its merit. There was no demand for a new edition of Justinian, and the present edition has made the extensive demand which it has supplied. The notes are clear and instructive, without the slightest taint of pedantry, ending always just when the fit word has been spoken. In reading the book one can but recall the remark that there is no antiquity except that of the Middle Ages. When we trace the course of the law backward through the disjointed and illogical customs of the feudal days, until we get to the codes of Justinian, we experience such sentiments as might have consoled the traveller during the Augustan age, who, having traversed barbarous Britain and Gaul, should from some summit of the Alps catch a view of fair Italy, with its cities, its temples, its porticos and well tilled fields. The law has lost its rugged asperity, and everywhere we perceive something of the order and precision of a Roman camp. It seems to come back to us as something remembered. Many of the sections of the Institutes read like the head-notes of recent cases, and we feel at home with familiar principles. We are indeed on familiar ground, for we have been admitted into the great and immemorial domain of the law, from whence all nations have drawn counsel and instruction. There is no sense of weariness. Only a few evenings rightly spent suffice to make us acquainted with the outline of the Roman law as it is contained in the Institutes; and certainly time thus passed could never be regretted.

As for Prof. Hammond's Introduction, we can only say that we wish that there had been more of it. Naturally he felt a little cramped for space; and he started several enquiries which we would fain have seen him pursue. Let us hope that we shall sometime hear from him again, and more at large. As for the mechanical execution of the book, it is sufficient to say that it compares favorably with the London edition.

U. M. R.

LEADING CASES IN THE LAW OF TORTS, determined by the Court of America and England, with notes by MELVILLE M. BIGELOW. Boston: Little, Brown, & Company. 1875.

The legal profession is under lasting obligations to John W. Smith for his selection of leading cases on various branches of law, not so much for the work itself, admirably done as it was, for the original conception which has been so fruitful of good results. He was a pioneer, who not only blazed his way through the growing forests of the law, but disclosed a plan by which the apparently tangled regions to those traversed by himself might be mapped out. It was a brilliant thought, an inspiration of a happy moment, to select the giant monarchs of the wood as central points from which to develop method out of the maze. Looked at from the front all was beginning to seem chaos and confusion; seen from the chosen stand-points, and making allowance for dead wood and undergrowth, all became order.

Dropping metaphor, it may with truth be said that Smith's *Leading Cases* marks an era in the progress of the common law. The rapid multiplication of legal decisions had begun to render the old case-law routine no longer possible. Precedent could not be followed as such where the rulings had become conflicting, or, carried from different centers, had commenced to interlock and create the appearance, if not the reality of conflict. It was absolutely necessary to fall upon some plan of grouping and accurately discriminating the cases, to enable the busy lawyer to advise, and the hard worked judge to determine. The plan hit upon was admirably adapted to the conservative common law lawyer; while the juxtaposition and critical analysis of the cases tended to eliminate the principles which underlay them, it left the cases themselves in full force as precedents. It was a step of progress to a higher plain of the law, where it will be less important to know how a question has been decided, than why it has been decided.

Mr. Bigelow's *Leading Cases on the Law of Torts* is the latest work in this line, and worthy of an association with the best of its kind. It combines clearness of style with compact brevity of expression, and discriminating analysis. It has, in addition, a new feature in the annotation of leading cases, which will commend it to students of the profession of all ages. He commences each chapter with notes upon a leading case with a brief historical sketch of the origin and progress of the branch of the law under consideration.

subsequent to the Norman Conquest, and up to the modern stage of development. These are admirable summaries, short enough to be read even by the practitioner who is examining the book under the exigency of business, and yet so full of matter as to enrich the stores of the enquiring student, and whet his appetite for deeper research. The multiplicity of modern books, with their white paper and clean cut type, of which the work under consideration is itself a beautiful specimen, has a tendency to shelve the old masters, and relegate them to the dust and the worm. And yet nothing is more certain than that, in the common law system above all other systems, to understand the reason of the law we must know its history. Even the civilians, whose legal principles are, far oftener than with us, traceable to natural reason or universal ethics, dwell upon the importance of the study of the history of the law. And what a flood of light has Maine's archaic researches thrown upon even such subjects as the domestic relations, the descent of property, and the law of corporations! *Melius est petere fontes quam sectari rivulos*, is one of those favorite saws of Lord Coke that he is never tired of repeating. The deeper and more earnest the student, the higher will be his appreciation of this wise saying of the great master. To all such, the merit of the addition to the usual routine of annotation which we are now considering will be obvious.

Another excellent feature of these notes, admirably managed, is the occasional use, by way of illustration, of the texts of the civil law. We are not treated to long extracts of Latin from the Pandects or the learned glossators; but there is a printed reference to some provision of the Roman law directly pertinent to the matter under consideration, and bringing out sharply the contrast or analogy, as the case may be. Such references, while they do not distract the attention from the common law current, are highly suggestive, and tempt the student to that most important branch of legal education, comparative law. The existence of the same command in two different codes wonderfully aids in ascertaining the reason which underlies it; and the fact that two codes differ upon a precept, arouses the attention, and stimulates the intellect to learn the cause.

Notes to leading cases must, above all things, be practical; that is to say, they must be directed to show the application of the principles of the leading case to subsequent cases. The historical matter should be brief and separate; the illustrations from other

seems short and pointed; the subsequent divisions should be grouped under separate headings and diverging lines. All of these requisites are here found; the writer never loses sight of the main object. The matters that constitute the gist of the leading case, the principles enunciated by it, are selected for illustration; the attention of the reader guided by head lines according to the present usage, and the authorities cited in the best order for their thorough understanding. The author makes suggestions as to the weight of authority, or the better reason, where there is a conflict, and he is careful to give all the cases, so that the reader, if he differs, may draw his own conclusion. Under these circumstances, the expression of opinion of a careful annotator is desirable. For, if you are inclined to differ with him, the fact that he comes to the conclusion he does, will make you pause and examine the ground more carefully than you otherwise might. And to those who do not think for themselves a guide is indispensable.

The plan of the work may be illustrated by reference to the mode of treatment of the first topic of discussion,—Deceit. The leading case is, of course, *Pasley v. Freeman*, 3 Term Rep. 51. The principle settled is, that a false affirmative, made by the defendant with intent to defraud the plaintiff, whereby the plaintiff gives damage, is actionable, whether the defendant is benefited by the deceit, or colludes with the person who is benefited, or not. The note in this case opens with a historical sketch, from which it appears that the original form of the action is for a deceit upon the court. Thus the writ of deceit in the olden time, lay for the recovery of lands adjudged to another in a real action through the fraud of the demandant, or of his sheriffs or officers; such, for instance, as the false return of the summoners, that the tenant (now plaintiff) had been summoned. The typical writ of deceit was, therefore, one in which the wrong was alleged to be in deceit of the court, and the redress for which has since become the province of the court of chancery. After the Statute of Westminster 2, ch. 13, which authorized the clerks in chancery to form writs, *in consimili casu* to those already in existence, for new cases, there seems, a period of a century and a half when the writ of deceit was used as a model for the new writs. Subsequently, trespass on the case took the lead, and overshadowed its elder brother. It will be noticed that the leading case involves the knowledge of the falsity of the representation, the intention of the party making it, and the fact that it was acted upon to the plaintiff's i

jury. These several points are taken up *seriatim*, and illustrated by the cases. A separate heading is given to representations concerning solvency. Next follows a leading case on slander of title, with a discriminating note of decisions. Then follow two leading cases on the subject of imitating trade-marks, with a note devoted to the authorities upon this important branch of modern mercantile law.

It will be remembered by many of our readers that quite a discussion arose out of a decision of Judge Dillon in *Sullivan v. Union Pacific R. Co.*, reported in 1 Cent. L. J. 595. That was a case where the father sued the railroad company for the loss of services of his son, who, while in the employ of the company, was injured by the alleged negligence of the company, so that he died within six hours thereafter. The learned judge came to the conclusion that the action was maintainable, notwithstanding the ruling in *Baker v. Bolton*, 1 Campb. 493, for the loss of the services of the son, not merely to the period of his death, but until he would have arrived of age, if he had lived. The publication of this decision was followed, in that journal, by a suggestive article on p. 614, and a learned comment by Professor Hammond, on p. 622. A consideration of the question fell within our author's note under the head of Assault and Battery, subheading Master and Servant, and is noted somewhat briefly, it must be admitted. He quotes Mr. Reeve's suggestion that the figurative expression of the merger of the civil injury in the felony, is incorrect. That the real ground why the master has no remedy for the felonious homicide of his servant, is that both the life and the estate of the felon are forfeited, and a civil action would therefore be fruitless. In this view the civil injury will not be merged by the felony where, as in this country, there is no forfeiture of estates for felony. Dom. Rel. 537. Several of the states, and Tennessee among the number, have accordingly held that the civil remedy of the person injured, is not merged in the felony. *Ballew v. Alexander*, 6 Hum. 433. Another reason which operated in England for the adoption of the rules, if rule it was, will be found in the fact that no public officer existed there whose duty it was to assist the grand jury, and attend to the prosecution of crimes, and public policy required that the civil redress should depend upon the previous prosecution of the offender. The rule was, as our author tells us, (p. 233) that if the servant die, the master must proceed first by indictment; but, after trial, whether the offender be convicted or not, the master might bring

s action for damages, as the private right was only suspended until public justice is vindicated. In this country, where the state usually sees to the prosecution of such felonies, there is no reason why the master's right of action for civil redress should be suspended at all. And where the right of action is against a corporation, not subject to the criminal charge because incapable of committing it, no reason can be seen why the right of action should not exist at once.

The old maxim of the common law, *actio personalis moritur cum persona*, had something to do in shaping the decisions. This formidable maxim operated in two ways. In the first place, if the injured party died, all right of action against the wrong doer died with him. Broom's Leg. Max. 708. In the second place, if the wrong doer died, no remedy survived against his personal representative. The latter branch of the rule was held by Lord Lyndhurst, in the curious case of Viscount Canterbury v. Attorney General, 1 Phil. 306, 322, to apply to a petition of right, in which the petitioner sought compensation from the Queen of England for damages alleged to have been sustained, in the preceding reign, by the property of the petitioner through the negligence of the servants of the King.

While we are writing we notice another decision, and a curious one, on this common law maxim, given in Prof. Stewart's valuable abstract of recent English cases in 1 South. Law Rev., N. S., 798 under the style of Bradshaw v. Lancashire & Y. R. Co., 44 L. J. 148. The action was by the executrix of a person who met with an accident while traveling on the defendant's road, which disabled him from attending to his business of a bootmaker, and diminished his profit, and caused the incurring of medical expense in endeavoring to cure his injuries. He died of a disease unconnected with the accident. The executors sued to recover compensation for the sums expended in medical attendance, and for the loss of profit arising from the inability of the deceased, by reason of the injuries received, to attend to his business. The declaration was framed upon a contract between the deceased and defendant, and alleged that, by breach of it, his personal estate was lessened in value. "It has been urged," says the learned judge, "that the maxim, *actio personalis moritur cum persona*, applies, and that the remedy dies with the person; but when bodily harm is sustained, owing to a breach of a contract, two causes of action may accrue to the person injured; he may obtain compen-

sation for his bodily sufferings, and also for such injury as his personal estate may sustain. The two causes of action are distinct from each other, and the executrix *sues for the diminution of his personal estate*. I think that the remedy for this injury survives to her, and that the maxim which has been cited does not apply." The old common law stands a poor chance, it seems, either in the old country or the new—in the center of population, or the wilds of Nebraska.

Not unconnected with this subject is a quotation from Bracton, given by our author on p. 585: *Actio vero legis Aquiliæ de hominibus per feloniam occisis vel vulneratis dabitur propinquiorebus parentibus, vel extraneis homagio vel servitio obligatis, ita quod eorum intersit agere*. Our author suggests, with reason, that Bracton, as is his habit, simply took the familiar Roman name to designate a broader existing right of action. The Aquilian law gave a remedy against any one who wrongfully slew another's slave or beast. According to Gaius, § 213, the master had his choice to pursue the murderer of his slave criminally, or to sue for damages civilly; but by the Institutes of Justinian, L. IV. T. 3, § 11, the master was entitled, in such case, to his private action for indemnity, and to prosecute the murderer criminally. The maxim of the common law did not prevail in the Roman law, nor, in its subsequent vigor, in the common law of Bracton's time, nor originally among the Germanic races. For, as pointed out by our author, (p. 586, note) the right of the kinsman of a man slain to recover compensation for the killing of a person, was essentially the same as the wergeld or blood-money of the Anglo Saxons and Franks. Modern civilization, by statute and decision, is coming back to the remedies of the (so-called) ages of barbarism, and blood-money once more becomes a legal right.

Compensation in money for bodily injury was given by the Twelve Tables, with a lingering exception in certain cases in favor of the more archaic remedy of the *lex talionis*. Gaius §§ 223, 224; Just. Inst. L. IV. T. 4, § 7. The retention of the latter was, no doubt, a survival, and merely nominal. The compensation in money was definite and graduated according to the gravity of the offense, which was ascertained not by the crime, but by the position of the person on whom it was committed. Montesquieu tells us that at one time in France, the fine for killing a Roman was less than that imposed for the death of the lowest serf. By the edict of the Prætors, the fixed compensation of the Twelve Tables

as changed into nominally allowing the injured party to fix his own compensation, subject to the supervision of the Prætor; in reality, the damages were determined by that eminent functionary, according to his judicial discretion. The letter of the old law was retained. it will be noticed, at each step, but the substance was changed. The popular prejudice was consulted in words, while the progress of enlightend justice was secured. Perhaps we might find analogous illustrations of such legislation without going back two thousand years.

The word "analogous" just used, reminds us of an analogy of the recent English decisions, commented on by our author in his notes, which would have made a Roman jurisconsult stare, at any period of the history of that government of laws. In *May v. Burnett*, 9 Q. B. 101, given at p. 478, *et seq.*, we have a leading case to the effect, that a person who keeps an animal accustomed to attack man, with knowledge of its habits, is *prima facie* liable to an action on the case by any person injured by the animal. The Roman law, as shown by Dr. Wharton in his recent original and eminently able work on Negligence, takes a distinction between animals which do injury *contra naturam*, and those which do it *secundum naturam*; in other words, between domesticated and wild animals. If the injury be done by an animal of the former class, the presumption is that it was provoked by the party injured, and the burden is on him to disprove the presumption. This distinction is, it seems, not recognized directly by our law, but is, perhaps, in effect, by throwing upon the person injured by a domesticated animal the burden of showing knowledge by the owner of its habit to do mischief, and, in the case of wild animals, by resuming knowledge on the part of its keeper of the evil propensities of such animals. The result is, that where a person brings a wild animal on his premises he does so at his peril, and is *prima facie* liable for the injury he may do to others.

The principle thus established in this class of cases is extended, says one author, in England, to even cases where a person, for his own purposes, brings upon his land and keeps there anything likely to do mischief if it escapes. Thus, in *Ryland v. Fletcher*, L. R. 3 H. L. 330, the defendants had constructed a reservoir on land separated from the plaintiff's colliery by intervening land. Mines under the site of this reservoir, and under part of the intervening land, had been formerly worked; and the plaintiff had, by workings lawfully made his own colliery and in the in-

tervening land, opened an underground communication between his own colliery and the old workings under the reservoir. It was not known to the defendants, or to any person employed by them in the construction of the reservoir, that such communication existed, or that there were any old workings under the site of the reservoir; and the defendants were not personally guilty of any negligence. The reservoir was, in fact, constructed over five old shafts, leading down to the workings; and when it was filled, the water burst down these shafts, and flowed, by the underground communication, into the plaintiff's mines. It was held, in the Exchequer chamber, that the defendants were liable for the damage so caused; and this judgment was affirmed in the House of Lords. In delivering the judgment in the Exchequer chamber, Mr. Justice Blackburn said: "The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth from his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works is damnified without any fault of his own; and it seems but reasonable and just that the neighbor, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. * * * And, upon authority, this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stench." The authorities are then reviewed in support of the position from the Year Books down, embracing cases of injury by escaping cattle, by mischievous animals, and by filth. The principle was again enforced in *Smith v. Fletcher*, 7 Ex. 305, where the damage was also occasioned by escaping water. "If," said the court, "the similitude to responsibility for a dangerous animal is looked for in this case, it will be found the defendants did not indeed keep, but they created one for their own purposes, and let it go loose. It is as though they had bred a savage animal, and turned it loose on the world." It is the analogy relied on, and not the conclusion reached, that constitutes the curious part of these cases. But the conclusion was not followed in *Losee v. Buchanan*, 51 N. Y. 476, cited by our author at p. 498, where the damage was occasioned by the explosion of a steam engine, and

ere the analogy to the ravages of a wild animal would seem to be more striking.

When Mr Meigs' invaluable Digest of the Tennessee Reports is a new book, I remember, in glancing over it, to have paused in wonder over a subdivision under the general head of Criminal Law, thus: "670. Imputability." Turning with some curiosity to the place indicated, I found that the word was applied to a presumption of law that a boy fourteen years of age is *doli capax*. Our reflection was, that it was fortunate such a word could be put to any use. In reading our author's note on contributory negligence, the incident just mentioned was called to mind by a heading thus: "Identification or Imputability." In this instance, the word is applied to designate a rule, laid down by the English common law courts, that a passenger in a stage or railway coach becomes so far identified with the carrier, by the act of obtaining passage, that the negligence of the carrier is imputed to him, in the case of accident by the contributory negligence of a third person, so as to bar an action against such person. That is, if your carrier was guilty of contributory negligence, you cannot sue the third person liable for any damage to you, although such third person was also guilty of contributory negligence. The rule is, as pointedly put by the editor of a recent edition of Smith's Leading Cases, that if two drunken stage coachmen were to drive their respective carriages against each other and injure the passengers, each set of passengers is, by a fiction of law, identified with the coachman who drove them, so as to be restricted in their remedy for injuries to an action against their own driver, or his employer. I am inclined to think that such a doctrine is fairly entitled to be described by the nondescript word "Imputability." It has been dissented from by Dr. Lushington in the High Court of Admiralty, and by the Scotch judges educated in the civil law, and by a majority of the state courts. Our author has collated the authorities on this curious point.

I had made a note of several other curious points, or "nice mutations of the law," for comment, but the length of my manuscript compels me to come to a close. We can assure our readers, that the volumes in this volume are not only valuable collections of the law, but also very interesting and entertaining. They beguiled us into a much more thorough reading than we contemplated. In our reading, we noticed a few typographical errors that mar the beauty of the volumes, but none seriously impairing the sense. In two instances

there were slips of the author's pen, for the pen will sometimes, curiously enough, make us write exactly the opposite of what we intended. Thus, on page 163, the demurrer in *Dunn v. Winter*, is said to have been *sustained*, when the context shows, what was the fact, that it was *overruled*. So, in another place, the word "valid" is printed "void," but this may be a typographical blunder. These are trifling blemishes, and not worth noticing. The author's work would cover a multitude of worse faults, if they existed. He has our thanks for a treat in a line of professional reading in which we do not often indulge, being somewhat out of our wonted beat.

W. F. C.

PHILLIPS' PRACTICE—SECOND EDITION—Jurisdiction and Practice of the Supreme Court of the United States, with Forms of Process, the Rules of the Supreme Court, the Court of Claims and the Courts of Equity, Admiralty and Bankruptcy. By P. PHILLIPS. Revised Edition, October, 1875. Washington: W. H. & O. H. Morrison. 1876.

The title of this book indicates its main scope and purpose. But in treating of the jurisdiction and practice of the Supreme Court, the author has properly, if not, indeed, necessarily, introduced subjects which make his work quite as useful and valuable in many respects to the practitioner in the circuit courts of the United States, as to the practitioner in the Supreme Court. Perhaps no person in the country was better fitted than Mr. Phillips to produce a work on this subject. He is well known to the profession as a sound and ripe lawyer, who has had and now has an extensive practice in the Supreme Court. Mr. Phillips' mind is eminently logical and precise; and this is displayed in the arrangement of his topics and in their treatment. The earlier portion of the work is devoted to the jurisdiction of the Supreme Court as conferred by the Constitution—this being the only court of the United States which is rooted in that instrument, and whose existence and essential structure is beyond the power of Congressional control. In what cases that high tribunal has *original* and in what *appellate* jurisdiction only, and the manner in which it is to be exercised, is clearly set forth as shown by the decisions of the Court. He then treats of the *mode* of taking cases to the Supreme Court in order to call into action its appellate or revisory power: viz., *writs of error* to final judgments at law in the circuit courts, and *appeals* from the final decrees of such courts in cases of equity and admiralty juris-

tion. And herein he considers the *parties* to writs of error and appeal; the *finality* of judgments and decrees; the *value* in dispute; the right of revision; the *limitation of time*; the *citations* (notice); bail and *supersedeas*.

Having thus considered the appellate jurisdiction in respect to the inferior *federal* courts, the author next proceeds to treat of the extent of the appellate power of the Supreme Court of the United States over the judgments and decrees of the *state* courts, and the mode of exercising this high and delicate but most important and necessary power. The 25th section of the Judiciary Act, which originally conferred and regulated this jurisdiction, was technically repealed by the 2d section of the act of February, 14, 1867 (18 Stat. 385), which re-enacted it with some changes and additions, the nature and effect of which are determined in the case of *Mulligan v. Memphis*, 20 Wall. 590, and the latter act is carried without substantial change into the Revised Statutes (Sec. 709). That it is a *federal* question, within the meaning of Congress (for the judicial control is limited to cases involving such questions), and that it must *appear* that such a question was involved and decided against the right claimed by the plaintiff in error or appellant, under the constitution, laws, treaty or authority of the United States, and the machinery necessary to subject the state decision to the review of the National Supreme Court—all are presented in a many-sided manner. This is one of the longest and most valuable chapters in the book.

Other chapters follow which relate more fully to the circuit courts of the United States than to the Supreme Court; such as those of Writs of Exceptions, Trial without Jury, Statement of Facts, Practice and Procedure Acts, Certificate of Division, etc.; but we cannot go into detail on these matters, and will only make a slight reference to chapter 25, which treats of the obligatory force of decisions of the highest court of a state upon the courts of the United States. It implies no want of the profoundest respect for the Supreme Court to say that their judgments on this subject have not only seemed to us, been always consistent, nor left it, in some respects, free from doubt. The express statute provision on the subject was contained in section 34 of the Judiciary Act, "that the laws of the several states, except where the constitution, laws, and treaties of the United States shall otherwise require or provide, shall be regarded as *rules of decision*, on trials at *common law*, in the courts of the United States, in cases where they apply." This provision is re-enacted in the Revised Statutes (sec. 721).

It is settled that the word *laws* as here used does not refer to the decisions of the state court, such decisions not being *laws* within the scope of the meaning of the section. But it does refer to *statutes* as distinguished from adjudications: but not, it seems, to all statutes. Statutes strictly local, relating to titles to lands and to things permanently intra-territorial, are admitted to be within the provision, and in such cases it is also admitted that the decisions of the supreme court of the state construing the statute are practically part of it, and must be accepted and followed by the courts of the United States. The statute provision in question does not by its terms extend to *equity* cases; and as the federal chancery jurisdiction is the same in all the states, the decisions of the state court, in cases not controlled by local statutes or usages having the force and consistence of statutes, have no binding force in the courts of the United States, in the decision of equity causes. Nor can state statutes and decisions thereon apply to the *criminal* jurisdiction of the federal courts, unless the state statutes in this regard be adopted by Congress. Beyond this there seems to be uncertainty as to how far the federal courts are *bound* to follow state statutes or adjudications thereon; and it is perhaps true that the decisions of the Supreme Court of late years have discovered a tendency to restrict the operative force of state laws in the federal tribunals. Examples of this are afforded in *Gelpcke v. Dubuque*, 1 Wall., 75, and *Butz v. Muscatine*, 8 Wall. 575. This last case, when critically examined, seems to conflict with *The Supervisors v. United States*, 18 Wall. 71, although the learned justice delivering the opinion thinks otherwise.

Some of the difficulties arising on the decisions of the Supreme Court on this subject are pointed out by the author.

We cannot conclude our notice of this useful and valuable work without expressing our regret that a table of cases has been omitted, and that the changes made by recent statutes were not incorporated into the text in the place of superseded provisions, instead of being placed at the end of the text of the former edition, a course rendered necessary, perhaps, by the publishers having stereotyped plates on hand.

J. F. D.

HILLIARD ON TAXATION.—The Law of Taxation. By FRANCIS HILLIARD. Boston: Little, Brown, & Company. 1875.

Twenty years have passed since the growing jurisprudence of America called forth from Mr. Blackwell his well-known treatise on

branch of the subject of taxation which concerns the power over all lands. It is a matter for curious reflection, if not for more serious study, that not until now has the necessity been felt for a treatise of a general character upon the whole subject, and that during these two decades this branch of law has expanded in the direction of special subjects formerly but little noticed. Mr. Hilliard finds the subject of the sale of lands for taxes still possessing peculiar importance. An examination of his pages shows that the special topics of Exemption from Taxation, Place of Taxation, and Local Assessments for Improvement, have risen in importance since Blackwell wrote; and he has given them deserved prominence in his treatise, while assigning chapters to the questions respectively of taxes laid on Banks, on Railroads, and on Corporations gener-

ally. The arrangement of the work into chapters, by topics is according to the usual custom of the author. With his method of analysis the profession are already well acquainted. The decisions are introduced in their appropriate connection, and usually without introduction of the author's personal views, though it is evident from his preface to the work before us that he has not failed to give some thought and reflection to the general tendency and progress of the judicial mind, and that possibly his own conclusions in reference to the subject might prove interesting.

Mr. Hilliard's works have a fair standing, though not generally commanding high. The present one will be well received by the bar, as it treats of a subject possessing both importance and interest, and exhibits researches into about 2500 reported cases; and Mr. Hilliard's citations are usually found correct transcripts from the original of the reports. So the book can scarcely fail to be of use to the profession, though he has not cited all the accessible cases.

The faults exhibited in the author's other writings are apparent here. A turgid style is observable, as in such sentences as these: "With reference to the form of taxation, it has greatly varied at different periods." (Pref.) "With regard to the *statute law* on the subject of taxation, it is as voluminous as the constitutional provisions are few and concise." (Pref.) "With regard to the extent of the taxing power of the legislature, its very broad extent is strongly expressed," etc. "With reference to the mode and rate of *valuation* in the taxing of railroads, railroad property should be assessed at its present, and not its prospective value." (p. 285.) "Frequently a separate 'section,' distinct from all others, and regu-

ly numbered, consists of a few words, or a mere note, without reference or citation of authority, as in these instances: "The revocability of a tax is revocable." (p. 15.) "The distinction between a tax and a debt has been often recognized." (p. 16.) "The whole subject of the precise nature of a tax was fully decided in Massachusetts." (p. 18.) "Some English cases illustrate the nature and extent of this exemption." (p. 77.) "Railroad corporations are frequent claimants for exemption from taxation." (p. 8.) "In the conflict of authority some important distinctions are to be observed." (p. 351.) "Abatement sometimes turns upon questions of time." (p. 436.) "Questions also arise as to party defendants." (p. 477.)

However pertinent may be these terse sentences, the taste of giving each of them the prominence of an entire "section" may well be questioned. Indeed, we do not see any use in Mr. Hilliard's plan of numbering separately the sections of each separate chapter. With such an arrangement his books are not and cannot be cited by sections, and the marking and numbering of the paragraphs as sections only tends to confuse the reader.

The purely factitious character of this numbering of sections is illustrated by the fact that, in frequent instances, the numbers are repeated on the same page, with the addition of letters, after the manner of codifiers and annotators who interpolate later matter into the new edition of an original text. Thus, on page 461, are sections 55 and 55a, 56 and 56a. But this is the first edition of the work, and we find throughout the volume, two sets of notes; the first designated by numbers, and the second by letters, the latter frequently containing a large amount of text derived from late decisions. It may be inferred from these circumstances that the author has made unusual haste to issue his book, "padding" it unnecessarily, rather than re-arrange paragraphs already written, placed and numbered.

We are led to doubt the completeness of Mr. Hilliard's work, when we find no reference under the head of discriminative taxation of foreign corporations, to such important cases as *Paul v. Virginia*, 8 Wall. 158, and *Ducat v. Chicago*, 10 Id. 410; or find, in other cases meagre citations of authorities on disputed points of importance.

In one respect this volume is to be greatly commended, in that the author has made so many citations of the latest cases, as reported in the various law journals, to which he justly refers as "valuable

entirely reliable law journals, which, with their other numerous merits, furnish the profession with decided cases often much in advance of the regular reports" (p. 269.) The profession will regret, however, that he does not tell them precisely where to find the case of *Slack v. Tucker*, credited broadly to the *Albany Law Journal*, at page 187, or the case of *Jewell v. Steinburg*, cited with indefiniteness at p. 331. It is unsatisfactory that he should omit the name of the case reported at page 442, from 1 Cent. Law Jour. 262, and the volume of that journal from which he cites the case of *Moore v. Chattanooga* at p. 480. And with all due respect for the *Central Law Journal* we would have preferred to be told by Mr. Hilliard that, of the cases he cites from it, *Tappan v. Merchant's Nat. Bank* (p. 233) appears also in 19 Wall. 490; *Johnson v. New Orleans* (p. 641) is also reported in 20 Wall. 57; and *Chapman v. Templeton* (p. 551) may be found also in 53 M. & W. Mr. Hilliard cites (at p. 359), *Hitchcock v. Galveston*, crediting it to 1 Cent. Law Jour. 331, whereas it is found in the 1st vol. of that journal at page 331. He also credits (at p. 12) *Griener v. Weisenberg Schl. Dist.* to 37. Pa. St., instead of 57 Pa. St., 43. It may be said these are but typographical errors, which should be overlooked. But do not such errors testify of too great haste in the production of law books, and should we not expect to find freedom from such errors in a veteran text writer?

The manner in which Mr. Hilliard frequently cites cases is calculated to lead to mistake and confusion on the part of students and practitioners. Abbreviations of long named cases are not in vogue in these economical days. But what shall we say of such abbreviations as *Taylor v. Board* (p. 422), *Goodrich v. Compour* (p. 354), *Keesee v. Civil* (p. 4), *Fire v. County* (p. 217), *British Commissioners* (p. 208), or *Union v. Lincoln* (p. 266)?

The Sun Mutual Insurance Co. v. The Mayor, etc. of New York (N. Y. 241), would be abbreviated by Mr. Wallace to "*Insurance Co. v. New York*," on the principle of dropping the first name of the party reporting, and retaining only the last. But Mr. Hilliard makes it "*The Sun v. New York*." (p. 217). Would he report the case of *John v. Roe*, under the style of *John v. Richard*? We can reconcile the cases cited by the text writers only in the dress given them by the official reporter. In Mr. Hilliard's volume, many cases appear as masqueraders.

The index covers forty pages, not very closely printed, and would need many additions to make it complete and satisfactory.

The typographical and mechanical execution of the work are in the handsome style for which the publishers are famous. P.

BIGELOW ON ESTOPPEL. A Treatise on the Law of Estoppel. By MELVILLE M. BIGELOW. Second Edition. Boston: Little, Brown, & Company. 1876.

It is not our purpose to review at length a work already so well and favorably known to the profession as Bigelow's Estoppel. Considering the vast number of reports to which resort must be had for the law on this subject and that the profession for whose use it is intended, is widely scattered throughout forty states and several territories, with no access in most cases to full libraries, the plan on which this work is constructed is judicious and greatly enhances its usefulness. It not only states principles, but it illustrates their application. This illustration consists in brief statements of adjudged cases, with quotations from the opinions of the court. Many subjects in the law are so extensive as not to admit of being thus treated within a reasonable compass. But the subject of Estoppel is limited, and all that is essential in the law concerning it can be fully presented in a single volume, so as to give not only deductions from the cases or the principles which they establish, but also a brief outline of the leading adjudications and the language of the judges, on the material points. This is a feature, in a law work, of great value to the body of the profession who cannot, in ordinary practice, consult, to any great extent, the reports. Long quotations from opinions ought, in general, to be avoided, and given, if at all, in the notes and not in the text; and this plan has, in the main, been pursued by the author.

Every lawyer who has been long at the bar, and every judge who has had much experience will, we think, quite readily agree with the statement that some of the most difficult and perplexing legal problems arise upon the law of estoppel. On many points, and unfortunately those which arise most frequently, the law is, we regret to say, in anything but a satisfactory condition. Take for example, the case of a judgment. Of what matters is it conclusive? Does it conclude such matters only as were actually litigated or which the plaintiffs declaration or bill, or the pleadings as framed, brought into controversy, or does it extend to all matters which, though not actually litigated yet *might* have been? The authorities are not uniform, and the broad view which seems to have the sanction of the Supreme Court of the United States (*Aurora City v.*

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est, 7 Wall. 82; *Beloit v. Morgan*, Ib. 619) has not met universal approval.

The cases are well presented by Mr. Bigelow and the state of the law is accurately mirrored.

Estoppel *in pais* has in modern times come to be a doctrine of extensive scope, and properly understood and carefully applied a useful agency in the administration of justice by estopping parties to insist upon mere technical rights when these would in the particular case, defeat the right and work inequity. This principle, from the nature of the grounds upon which it rests, pervades the entire law, and consequently its application is limited to no part and to no class of cases. It extends, with modification of course, to corporations, public and private, as well as to natural persons. Indeed the doctrine is most salutary when applied to corporations.

We have examined Mr. Bigelow's treatment of estoppel as applied to corporations, and while the subject is carefully presented and the law correctly stated, it is not as fully gone into, considering its importance, as might have been advantageously done. For example the subject of estoppel with reference to insurance companies. The case of the [Union Mutual] Insurance Co. v. *McKinstry*, 13 Wall. 222, 1871, is not cited. That case lays down a principle of great importance, and is inconsistent with numerous judgments to be found in the reports, including those of the Supreme Judicial Court of Massachusetts. It asserts against the parties a principle of estoppel required by justice and fair dealing. Coming from the Supreme Court it will go far towards settling the law on the subject throughout the country.

But we may not enlarge. The author's industry and research have been such that it will be found that the instances are rare in which he has omitted an important case from a leading court or report bearing upon the topics he discusses.

The differences between this edition and the first, although a few years have elapsed, show how rapidly the law of estoppel is changing and growing.

Upon the conclusiveness, or rather the want of conclusive effect, of the record of judgments of sister states as to jurisdictional facts, about which there have been so many conflicting views in the reports, we notice that the author cites the recent cases of the Supreme Court of the United States, which authoritatively settle the question. We refer of course to *Thompson v. Whitman*, 18 V. 116; *Knowles v. Gas Light Co.*, 19 Wall. 58. J. F. L.

HIGH ON RECEIVERS.—A Treatise on the law of Receivers. By JAMES L. HIGH. Chicago: Callaghan & Co. 1876.

Mr. High, in completion of his "series of text books upon the principal extraordinary legal and equitable remedies now in general use," presents the profession with a new work on the Law of Receivers, a compact volume of 540 pages, which will prove a welcome addition to the line of standard text books.

The law on this subject is the product of the practice of the courts, expanding with the necessities of successive cases in actual litigation. Mr. High has apparently taken this fact as the key of the plan on which he has constructed his work. Without offering his own reflections, either in introduction or conclusion, he has presented in the form of a treatise, a summary of the decisions upon the various branches and subdivisions into which his subject naturally ramifies, as exhibited in about 1,100 reported cases. This is the first attempt, as the author properly claims, "to present the entire body of English and American law upon the subject of receivers." Mr. Edwards' work cited only about one-half as many cases as does Mr. High's, while Mr. Kerr's English work, with its American notes, is not only smaller in compass, but does not profess to deal with the subject after the manner chosen by Mr. High. But the present work does not, unfortunately, exhibit all the reported cases, and with all its excellencies, cannot be said to be exhaustive.

We miss, for instance, the cases of *Talmage v. Pell*, 7 N. Y. 328, *Tuckerman v. Brann*, 33 N. Y. 297, and *Agricultural Bank v. Burr*, 24 Me. 256, which support the proposition stated by the author in § 320, that the receiver of an insolvent corporation may disaffirm the fraudulent or illegal transfer of its assets made prior to his appointment; on which point there is no such excess of authorities as to make the citation of any of them superfluous. And upon the disputed question whether a receiver may sue in his own right in the courts of another state than that of his appointment, (§§ 239 to 244), no references are made to the Louisiana cases affirming the right, viz.: *McAlpin v. Jones*, 10 La. Ann. 552, in which a receiver in chancery from Mississippi was allowed to sue; *Planters Bank v. Bass*, 2 La. Ann. 436, in which the "trustees" of an insolvent corporation appointed by a Mississippi court were admitted to sue; and *Paraside v. F. & M. Bank of Memphis*, 4 La. Ann. 710, in which a receiver in chancery from Tennessee was permitted to intervene and claim impounded property. Upon so important questions as these, it is but prudent to cite all reported cases.



Mr. High's work is in the simplest form of treatise, namely, a selected statement in his own language of the different adjudications, grouped topically by chapters, which are in turn divided according to subordinate subjects.

The work is further divided into sections, numbered continuously, by which citations from it will be made; and at the head of each sub-chapter is given a syllabus of each of its several sections; the whole furnishing a very convenient continuous index; an excellent piece of work, after the general plan of which Mr. Hillard's books furnish us a familiar though not the most perfect example.

The form of treatise here adopted, which differs but slightly from the best, is a favorite one with many leading text writers. It is subject, however, to one objection; there is danger, in writing up and connecting together the various and often contradictory adjudications upon any point, of twisting the sense of each of them more or less, so as to give an appearance of harmony between them, which in fact does not exist. Thus the student who relies on the book is often misled, and finds, upon consulting the reports, a conflict of authority for which he was unprepared. We are not saying, however, but that the better plan is always to disclose frankly in the book every conflict or want of harmony between the courts. If ever allowed, the license may surely be granted to so prudent and cautious a writer as Mr. High, to so group the decisions as to exhibit the harmony that ought to characterize them, from the standpoint of impartial review, which the text writer often occupies long before the courts do.

We note with pleasure, that upon the question whether a receiver acquires such title as to enable him to sue in his own name, or must sue in the name of the person formerly having the legal title, and upon some other questions on which there is more or less conflict between the well settled policies of different states, the book is in opposition to each other, both sides of the question are set out at length and with apparent impartiality. It is plain that the author's purpose is to spread before the profession a statement of what the whole law on the subject to-day is, gathered from the most accessible sources, and neither colored by any lenses of his own selection, nor imbued with his own philosophy. We do not know what better plan could be followed, in a work upon a subject so interesting and so especially to the practice of the courts.

After discussing severally in detail the different questions of gen-

eral application to all receiverships, the author devotes separate chapters to Receivers over Corporations, Over Railways, Over Partnerships, and Over Real Property ; In cases of Mortgages and Cases of Trusts, Receivers in and of Judgment Creditors, and In connection with Injunctions ; a plan of subdivision which will especially commend itself to the lawyer in active practice, while it will also be of use to the careful student.

Mr. High's style is agreeably clear, simple and chaste, and furnishes a pleasing contrast to that of some more pretentious authors. As we read his pages, we are led to imagine that each adjudication has been fitted by some careful court for precisely the place to which the author has assigned it. But it is in fact the latter who in most instances, has dressed the rough block to fit its appropriate place in the temple he has himself designed. This labor, which does not appear on the face of the text book, will nevertheless be seen by a close observer, to have been done with care and pains by Mr. High. The result is a distinctive style of composition ; the same with which the readers of the author's other works are familiar, and which derives strength and force from its clearness and simplicity.

In another respect the work shows signs of careful labor, and this is in an unusually full and complete final index, occupying eighty pages. No work is more grateful to the practitioner than this of a faithful and full index ; and it is a matter of regret that it is so often slighted by the text writer, simply because it affords so little opportunity for show or parade. It is time the profession as one man, should condemn the slovenly indexing that too frequently obstructs the practitioner's investigations, and reward with special plaudits such conscientious pains-taking as that exhibited in the index to this volume.

The typography of the book is most excellent ; clear, handsome, and severely plain, it is all the most fastidious could desire. The dress of the book is the work of the "Chicago Legal News Company," upon whose good taste and enterprise it reflects high credit. To both printer and publisher the profession are in this instance under especial obligations.

J. O. P.

COOLEY ON TAXATION.—A Treatise on the Law of Taxation. By THOMAS M. COOLEY, LL.D. Chicago. Callaghan & Co. 1876.

An important factor in the origin of the contests which led to the Independence of the American colonies, was the excessive and

ous taxation imposed upon them by the mother country. The contests disclosed a radical difference of opinion on this subject between mother and daughter. It is not surprising, therefore, that America should still have an opinion of her own respecting taxation. We have continued for one hundred years considering and re-considering the various aspects of the subject,—“making up our mind” as it were. It would be appropriate, no more than timely, if, in this centennial year, we should have an authoritative expression of the national opinion on this fundamental question, in all its aspects. The late work of Mr. Justice Cooley is a treatise of no ordinary style and merit; and we think our countrymen will hazard little in offering it to the world at large as a fair statement of the legal side of our principles, opinions and sentiments, as they have grown with our growth, and now appear crystallized around our safest and most conservative institutions.

A question so inherently fundamental to the American system, as we have suggested this of “Taxation” to be, should be treated in a manner most thoroughly analytical, in order to be properly understood, and to be understood. No empiric can deal with such a subject, with safety to himself, or satisfaction to others. And inasmuch as ours is a system of three co-ordinate branches, a thorough understanding of these and their distinctions must enter into every study of taxation. In Judge Cooley, America has both a constitutional lawyer and a fine analyst, especially fitted for this particular work by his previous investigations in the field of our constitutional limitations. The peculiarly national character of his work will appear from this, that though he has at the outset quoted Adam Smith, Bentham and other writers on Political Economy, and English authorities, merely as introductory to his general line of discussion, yet, out of the 4,000 cases from which the legal principles enunciated are drawn, only a small portion of these, so small as to be almost infinitesimal, are other than American authorities.

The plan of the work is purely analytical, each separate phase of the subject being traced from its central and fundamental principle outwardly in each direction to its ultimate results. This design, and in fact, essential plan, is well developed. The work is seen to be a logical and philosophical exposition of the subject considered. It is, in fact, a *treatise* in the best and highest sense,—to say, it is *the author's* treatise impressed throughout with its own originality and personality. No one need expect to find

this volume a digest. It is the very opposite of a digest. Such a work on this subject, the author says, would be "exceedingly liable to mislead, by giving as a general rule of law, what is only a conclusion from a local law or custom. There are, or should be, general principles underlying all the cases." Judge Cooley has endeavored carefully to elucidate these, in the analytical manner above referred to. By faithfully distinguishing, as occasion requires, those adjudications which so depend on local law or usage as to have intrinsically only a local value, the author has earned the gratitude of a profession which has too often been vexed at the careless enunciation by empiric text writers of local cases, as establishing universal rules.

Our readers would expect this volume, therefore, to be marked, as it is, by a distinctive and attractive style. We have elsewhere referred (p. 202), to the style of Mr. High's treatises as clear and agreeably simple. That of Mr. Justice Cooley in this work may be similarly described, save that the different character of the subject requires the frequent interposition of the author's views. It is fortunate that he has views which are worthy the attention of his readers. He says in his preface, "the preparation of any treatise on taxation necessarily involves the presentation of disputed points, and the expression of opinions upon them." A very large part of the work, therefore, consists of the author's statement as a jurist of the law on particular branches of the subject, expressed in a clear and forcible style,—whose conciseness is strength itself; often fortified by reference to authorities, but often also carrying with itself its own authority, not because dictatorial, but because logical and convincing. Thus the author seeks to "group the references about the controlling principles"; drawing the latter from decisions of courts wherever possible, but not afraid to endeavor to supply them himself when necessary.

Such a treatise will have a use not limited to the legal profession. Legislative and executive officers may and will study it to advantage. In fact, it was the author's purpose "to present in a shape for practical use, the general rules which must govern the action of all authorities acting in matters of taxation." Yet it is a legal treatise only; it exhibits to legislators, not the considerations of policy or political economy by which they should be guided, but the views only of that independent branch of government, the judiciary.

It would be pleasant to the reviewer to be able to give some examples of the style of this work. But the number of passages he

marked for quotation gives warning that an entire issue of the *VIEW* might be required. It must suffice to state that the purposes for which taxes are laid, the construction of tax laws, the levying, assessment and collection of the taxes, are each separately treated; the subject of sales of land for taxes is brought down to date in three separate chapters; a chapter is devoted to the curing of defects in tax proceedings, and three others to remedies in the courts, including the extraordinary remedies of mandamus and injunction; the modern doctrines, important and growing in importance pertaining to taxation of business, taxation under the power of police, and taxation by special or local assessments, are each fully discussed; and prominence is given to the constitutional questions of equality and uniformity in taxation, under which head the various topics of exemptions is fully considered. The subjects of taxation without representation, and the mistaken views commonly entertained of this principle, of taxation for purposes of religious and secular instruction, taxation in cases of extension of municipal boundaries, duplicate taxation, compulsory local taxation, taxation under police powers and by special assessments, and distress and other summary remedies, are among those, the discussion of which will be found particularly entertaining. But the whole work is of such a character that its effects upon the close student of the law will be fascinating. It must be examined and read to be appreciated. It is one of those rare books of the law—few, alas, in these days of many books—whose place and reputation cannot be ephemeral.

It is not intended to suggest here that the book is above criticism. But as to its peculiar and distinctive characteristics, a competent critic must needs be one who, like Judge Cooley himself, is not only a profound jurist, but has made taxation a subject for careful analytical examination. In matters of detail, doubtless faults might be found; for "great Homer sometimes nods." Thus, there are a number of late cases, germane to the subject, published in the law journals and periodicals of the day, and in late reports, and some of them possessing importance, which are not here referred to. Many would have preferred to have seen the copious and elaborate notes of the author, composed generally of statements of decisions, interpolated into the current text of the book; for though the author has not often in the main text discussed by name individual cases or opinions, he has done so in some instances; and the course here suggested would have added to the symmetry of the work.

But captious objections would be ungracious in the case of an author who has bestowed upon his book the amount of labor evident in this instance. The number of cases cited, as above stated, indicates the extent of the researches of the author. He has crowned his labors with a very full and exhaustive index, occupying 160 printed pages. For this last, though not least nor least valuable service, he will receive daily thanks from his readers.

The typographical execution of this volume is excellent. The press, though almost severely plain, is exquisitely neat, and is a fine specimen of the stereotyper's art. Section and paragraph marks are dispensed with, and the bold-face type in which the sub-topics of the chapters are printed furnishes the only display. J. O. P.

GUERNSEY'S KEY TO EQUITY JURISPRUDENCE. A Key to Story's Equity Jurisprudence, containing over Eight Hundred Questions. Being an Analysis, classified by Subjects and References, and an Index. Designed for the use of Universities, Colleges and Law Schools, and for private use. New York: Diossy & Co. 1876.

This little book contains just three hundred and sixty-two questions instead of eight hundred, as stated on its title page. A book which starts out with such a serious misrepresentation is not calculated to impress one favorably. Another feature which is painful to us, perhaps needlessly so, is that although this book consists of three hundred and sixty-two questions, it does not contain a single interrogation point; every question ends with a period. Now a period may be the proper point to place at the end of a question, but we doubt whether this book, handsome as it is otherwise, will succeed in introducing such an innovation. We have looked it over diligently with the hope of discovering its *raison d'être*, and do not feel that our explorations have been rewarded with a high degree of success. It may, however, be useful without our knowing it. Between each of the handsomely printed pages (handsome except for the lack of the interrogation points) is a blank page of writing paper finely ruled, on which the student can write his answers, culled from some treatise, to the three hundred and sixty-two questions, and thus construct his own little treatise on equity jurisprudence. This will perhaps be found as good a way as any to get rid of the rudiments of equity. But later in life the student will find that it is with equity as it is with law; one never learns it until he is knocked down with it.

SERIES OF ESSAYS ON LEGAL TOPICS. By JAMES PARSONS, Esq., Professor in the Law Department of the University of Pennsylvania. Philadelphia: Rees Welch. 1876.

The first thing which will attract the reader's attention on taking this book is the superb style in which it is printed. Aside from its intrinsic merits of the matter embodied in it, the printer has done his work in such a manner as to make it positively tempting to the reader. It is an octavo pamphlet of 153 pages, and embraces the following topics: 1. Law as a Science; 2. Parties to an Action; 3. The Statute of Frauds, Section Fourth, "A Special Promise to answer for the Debt, Default, or Miscarriage of Another;" 4. The Project of a Digest of the Common Law, either preliminary to a Code, or as a Finality; 5. Can a Use be limited upon a Use at Common Law? 6. The Doctrine of Accord and Satisfaction, which has superseded the Civil Law Principle of Novation; 7. The History and Growth of Civil Institutions. These essays are written in an easy and elegant style, and are deeply interesting and suggestive.

NOTES ON ELEMENTARY LAW. By WILLIAM C. ROBINSON, Professor of Elementary Law in Yale College. New Haven: Press of H. S. Grogan & Robinson, 1875. Octavo, cloth, pp. 152.

This handsome monogram comes to us with the compliments of the Yale Law School. It is intended, 1. to be used as notes to the lectures on elementary law delivered by the author to the students of the Law Department of Yale College; 2. to guide the private student in his investigations of the rules and doctrines of the common law; 3. to familiarize the student, to some extent, with the leading text books on the principal topics of the common law. It is written in a condensed form, and grouped in proper analytical order, with outlines and salient points of the common law, with marginal references to the text books used in the school; thus enabling the student, at his leisure, to pursue the investigation further. We regard it as the best book of the kind we have seen.

PROFOUND PHASES OF THE LAW. By IRVING BROWNE. San Francisco: Sumner Whitney & Co. 1876.

This is the first volume of a series of books entitled "Legal Relations," the publication of which our enterprising occidental publishers have undertaken. It is a neat cloth-bound duodecimo of 128 pages, printed in a style that cannot be surpassed in Paris or

in London, and sold at the popular price of \$1.50. The papers embraced in this first volume were originally published in the *Albany Law Journal*,—a publication which constantly dishes up to its readers good things of this kind. Unless we are a very bad critic, the author is not mistaken in his supposition that this little volume will serve to amuse the leisure hours of men engrossed in the dry profession of the law, and afford some amusement, as well, to outsiders. Like Mr. Heard's "Curiosities of the Law Reporters," it will afford the skillful advocate a stock in trade of good sayings, to quote, as occasion offers, to courts and juries. Nor is it as destitute of sound instruction as its title might indicate. The following extract, for instance, may be viewed in its humorous sense as illustrating the Law of Ballooning; but in a serious sense, it is a useful disquisition upon the doctrine of Proximate and Remote Cause; and it will also serve to illustrate the general style of the author, and character of the book.

"Guille v. Swan (19 Johns. 381) is a famous case. Mr. Guille was a person whose thoughts and wishes called him above the earth. He longed for something higher and better than worldly things. He was an aeronaut. He made a voluntary ascent in the vicinity of Swan's garden, and an unwilling descent into the same. In his peril he called aloud to the pursuing crowd to help him. Meanwhile he was being dragged along in the balloon, and causing some slight damage to Mr. Swan's garden sauce. The crowd, consisting of some two hundred good Samaritans, broke through Swan's fences, and threw his vegetables and flowers into great disorder. Now, it was lawful for Mr. Guille to ascend. It was lawful for the crowd to gaze and admire, for the balloonist to call upon them in his extremity, and for them to rush to the rescue. But Mr. Guille had to pay for Swan's garden sauce. It was unquestionably very selfish and narrow-minded for Swan to insist on indemnity, but he took a worldly view of the affair. He had no interest in the sublime problem of aerial navigation; he had no individual friendship for the aeronaut; he had no general care for the crowd; all he knew was that the radishes and other esculent roots had been spoiled, and he wanted his pay, and he got it. So mean is human nature; but we have to deal with it as we find it. It seems rather hard that one must be answerable for the vegetable and floral consequences of human curiosity, and for the officiousness of two hundred friends, when half a dozen would have answered every purpose. If science has to struggle against such things it is to be

and that the navigation of the air will remain an unsolved problem. If garden shoots are to be preferred to parachutes, man must be content to crawl along the potato-and-radish-bearing earth at snail's pace of sixty miles an hour. This idea of the consequences of curiosity troubles us. If this is the law, then Mr. Barin transporting his fat woman or Chinese giant about the country, might be made to answer for the safety of the bridges broken down by the crowds assembled to gaze at those unrivalled curiosities."

COMMENTARY ON THE LAW OF AGENCY AND AGENTS. By FRANK WHARTON, LL. D. Philadelphia: Kay & Brother. 1876. We reserve this work for an extended notice in our next issue.

REMEDIES AND REMEDIAL RIGHTS, by the Civil Action, according to the Reformed American Procedure. A Treatise adapted to use in all the States and Territories where that System prevails. By JOHN NORTON POMEROY, LL. D. Boston: Little, Brown, & Company. 1876.

This work, like the preceding, is too important to be dismissed in a few words. We therefore reserve it for a somewhat extended consideration in our next issue.

CASES ARGUED AND DETERMINED IN THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES, for the Seventh Judicial Circuit. By JOSIAH H. BISSELL, of the Chicago Bar, Official Reporter. Vol. 1. Chicago: Callaghan & Co. 1876.

This volume embraces cases scattered through various years from 1870 to 1874. The Seventh Circuit is presided over by Mr. Justice Bradley. The Circuit Judge is Hon. Thomas Drummond, whom the Chicago lawyers esteem the ablest of the nine circuit judges. We of the Eighth Circuit join issue with them in this; we are not willing to concede that there is any judge in any American court abler than Judge Dillon. We, however, do concede great ability to Judge Drummond, and we also concede that he is supported by an array of very able district judges. These facts, together with the other fact that the Seventh Circuit embraces several important commercial cities, make these reports very desirable. The reporter is a lawyer of good ability. In addition to the fact that he does his work of reporting, properly so called, in a creditable manner, he adds thereto the duties of editor, and enriches many of the decisions with notes of other cases. These books are printed and bound in excellent style.

IX.—NOTES.

HON. W. F. COOPER.

William Frierson Cooper, whose portrait we publish in this number, was born on the 11th of March, 1820, in Williamson county, raised in Maury county, and has lived since early manhood in Davidson county, three counties lying contiguous to each other across the center of the State of Tennessee. He is, by both parents, of the Scotch-Irish race from the north of Ireland, which constitutes so large a portion of the population of the Southern States. Both families, the Coopers and the Friersons, settled in South Carolina, his paternal grandfather being a captain in Sumpter's brigade during the Revolutionary war, and both moved to middle Tennessee early in the present century.

Being sent early to school, and having a ready memory, he was pushed forward beyond his years, and was always in classes of which he was the youngest member, and so continued until he graduated at college when only eighteen years of age. The strain upon his mental faculties was, however, as he is in the habit of saying, moderated by the absence of emulation, which he was too young to feel in its full force, and by an uncontrollable appetite for general reading. At twelve years of age, he spent a winter in New Orleans, where he learned the French language, and acquired a taste for French literature. In the summer of 1834, Mr. Polk, then a member of Congress from Maury county, concluded to take his youngest brother and two of his nephews to Yale College to finish their education, and young C. was persuaded to join them. Under the charge of the future President of the United States, these young Tennesseans paid their respects to the then President, the venerable chief from their own state, and bowed before the tomb of the first of Presidents. They entered the same class at Yale College, were joined by two other students from their state, making perhaps a larger number of Tennesseans than were ever together there at one time before or since, and five of them graduated in the class of 1838.

Upon his return home, one of the leading lawyers of Columbia,

needed a young man in whom he could have confidence to aid in his heavy practice, offered to give him an equal partnership on as he could obtain a license. But the young graduate considered himself unfitted for the contests of the forum, and declined the generous offer. He had previously concluded to study medicine, and diligently applied himself accordingly for the next two years, taking during the time a course of lectures at the University of Pennsylvania. This period was sufficient to satisfy him that the study of the profession chosen was profoundly interesting, its practice was not suited to his tastes. Having ascertained this fact, he made up his mind to change his profession, and immediately commenced the study of law. The lawyer already mentioned renewed his offer, and in the same month that the same of age, the subject of our notice obtained a license to practice law, and went into partnership with the late chancellor, Daniel D. Frierson.

The next three years were spent in active business and diligent study, which so increased the self-confidence of the young lawyer that he determined to seek a wider field. He spent the fall, and part of the winter, in New Orleans, being inclined to remove to that city. On his return he remained a few days at Nashville to argue some of his cases in the supreme court, and was so well pleased that he concluded to spend at least the ensuing summer in that city. Understanding his intentions, the Hon. A. P. Nicholson, late the chief justice of the Supreme Court of Tennessee, who had then only recently removed from Columbia to Nashville, kindly took him into partnership.

Nashville thus became the home, and, as it proved, the permanent home of the young lawyer. The comparative leisure of the next few years gave him the opportunity of deepening the foundations of his legal studies. He commenced at the same time, a mode of disciplining his faculties and increasing the accuracy of his knowledge of the state decisions, to report the opinions of the supreme court for one of the daily papers, preparing the abstracts, and, with occasional suggestions from the Hon. W. Gurley, one of the judges of the court, condensing the opinions themselves, when too long to be inserted *in extenso*. This he continued to do for several years. At the December Term, 1846, of the supreme court, his arguments were twice favorably noticed by the judge who delivered the opinion in the cases, one of these arguments receiving the unusual, if not unprecedented honor of

being expressly referred to and adopted by the court. *Brown v. Vanlier*, 7 Hum. 239. All of the judges of that court treated him with the kindness which was their uniform characteristic towards young men, but he formed an intimate and cordial friendship with Judge Turley, who, to a lofty intellect and genial disposition, added a fondness for general literature, which was a powerful connecting link between them.

In 1851, upon the death of Chancellor Cahal, the Nashville bar united in recommending Judge Cooper to fill the vacancy, but he declined to allow his name to be used when he understood that Judge Nicholson, who had returned to Columbia, was willing to accept the position. And, afterwards, when Judge Nicholson resigned, he warmly supported Judge Frierson for the office. In the latter part of the same year he entered into partnership in the practice of the law with the Hon. Andrew Ewing, which continued for ten years, and until he was elected one of the judges of the supreme court. By the terms of the partnership, Judge Cooper took exclusive charge of the chancery business, and Mr. Ewing of the business of the law courts, each following his cases to the supreme court. The equity business into which Judge Cooper thus stepped, had been built up by the Hon. Edwin H. Ewing, then and now one of the first lawyers and public men of the state, who had concluded to spend a few years in Europe. It taxed his powers to the utmost, and, increasing as it did with the growth of the city, it kept him incessantly employed during this period.

On the 8th of February, 1852, the legislature of the state appointed Return J. Meigs, Esq. and Judge Cooper to revise and digest the general statutes of the state. Under this appointment the present Code of Tennessee was prepared, and passed into a law by the General Assembly of 1857-8. Both revisers separately went over and digested the whole body of the law, compared together their separate work, and united in the drafts submitted to the legislative committee, and which were adopted by the legislature almost without modification. The analytic plan of the Code is, however, exclusively the work of Judge Cooper.

In 1854, upon the change in the state constitution giving the election of judicial officers to the people, Judge Cooper was a candidate for the office of Attorney-General and Reporter, but was defeated, his successful competitor being Hon. John L. T. Sneed, then a deservedly popular member of the opposite political party, and now one of the judges of the supreme court. In October, 1861,

he became a candidate to fill the vacancy on the bench of the supreme court, occasioned by the resignation of Hon. Robt. L. Caruthers, and was elected. The courts were, however, almost immediately thereafter closed by the late civil war, and upon the reorganization of the state government in 1865, new judges were appointed by the Executive. The enforced leisure occasioned by the war gave to Judge Cooper the opportunity of carrying out a long cherished plan of a trip to Europe. Some of the fruits of this trip have appeared in previous volumes of this REVIEW, under the style of "English and French Law," and "Modern Theories of Government."

Upon the re-opening of the courts at the close of the war, Judge Cooper resumed the practice of his profession, confining himself to chancery cases. He was in partnership for a few years with the Hon. Robt. L. Caruthers, his predecessor on the supreme bench, and upon his retirement, with his brother, Hon. Henry Cooper, the present senator in Congress. In November, 1872, he was appointed, by the Governor, Chancellor of the Nashville Chancery District, and in August, 1874, he was elected by the people to the same place. His decisions, since he has been upon the bench, have in part been published in the first volume of Tennessee Chancery Reports.

In the year 1870, Judge Cooper superintended the republication of the early Tennessee reports. He prepared, or re-wrote the head-notes of the first eight volumes of these reports, with notes and references. These volumes, together with a new annotated edition of Meig's Reports, were republished in 1870. Recently the work of republishing the Tennessee reports has been resumed by G. I. Jones & Co., of St. Louis; first Yerger, being now almost ready for issuance. Judge Cooper has consented to edit this republication. He has entirely re-written the head notes of the volumes of Yerger thus far prepared, with references as in the previous volumes. The advantage of the work is that it supplies the place of a Digest, each case referring to all others in which it is cited, or in which the like question is ruled.

Judge Cooper is now fifty-six years of age. The longevity of his ancestors and his temperate and orderly habits and cheerful disposition point to the conclusion that twenty years of vigorous and useful labor yet remain to him. Those years will yield the greatest benefits to society if consumed in the labors of the judicial bench. It may with some degree of truth be said of a judge, as of a poet,

that he is born, not made. We mean that the judicial temperament is innate in some men. Judge Cooper is one of those men. He loves the administration of justice. The possession of an ample competence places him beyond the reach of every ambition, except the ambition which has moved the greatest and best judges, the desire to do right and to leave behind an honorable name. The death of his former partner, the able and learned Chief Justice Nicholson, will, we are confident, restore Judge Cooper to his former position on the Supreme Bench of Tennessee. But we shall not be contented to see his usefulness limited to that position. For twelve years the South has had no representative on the Supreme Bench of the United States. The exclusion from the National Court of Last Resort of a section embracing one-third of the population of the Union—a section which has contributed to that bench such great names as Marshall, Taney, Catron and Campbell—a section, too, whose laws and institutions contain so much that differs from those of the rest of the Union—cannot be expected to last much longer. The South is fairly entitled to her representatives on that bench,—unless she is unable to produce lawyers worthy of such high positions. She can certainly produce one such man, and that is the subject of this sketch. When it shall become necessary to look to the South for a suitable appointee to that great court, the general consent of the bar will, unless we are greatly mistaken, point to him.

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CONTROVERSIES OF MODERN CONTINENTAL JURISTS.

II. CUSTOMARY LAWS AND CODIFICATION.

'The Law, like Language, or Manners, is a part of the life of a nation. The individuality and the nationality of a people are usually to be found in their laws, which undergo a transformation with the progress of time. The legislation which is young will always differ from that of a nation that is old; for the sum of the laws which beget the legislation of a country is nothing else but the mental character of that country.'

'Law is not an artificial and arbitrary thing that can be changed every instant; it is only the product of reflection of man or of society. The legislator who wishes to give to his work a body and a dominant form, cannot deviate from the truths of history, without danger of going astray. He cannot disdain facts, nor mistake the development of the public mind, without compromising the situation. Neither can he prepare for us an imaginary state of abstract happiness, without incurring the risk of destroying the foundations on which society rests. The true task of the legislator consists not in putting forth opinions purely personal and theoretical, principles more or less new; his task is to make known to the nation the germs of legislation which it contains within its bosom, sometimes unconsciously, and to give to these

germs a definite and precise expression. The legislator should have not only a thoroughly well developed mind and a synthetic ability, but he should also possess a profound historical knowledge, and should be intimately acquainted with all the peculiarities of each period, and with every form of law."

"The law is not the product of arbitrary will, but is the product of the entire past of a nation; it is not formed accidentally, but naturally. The law should be what it is, and not otherwise; that is to say, it should be the necessary result of the interior organization of the nation itself and of its history. Each epoch should apply its particular activity to properly lay hold of, to rejuvenate, and to revivify this given matter."

"With regard to these anterior elements there can be no question as to whether they are good or bad; for, to suppose that it would be well to admit them, or that it would be wrong to reject them, would be to recognize the possibility of that admission or rejection. It is rigorously impossible for us to withdraw ourselves from these various elements; they dominate us inevitably. We can give ourselves up to illusions, but we can change them never. Whoever abuses himself in this manner, and whoever wishes to act according to the caprice of his will, where a higher common will alone is possible, loses his finest prerogatives; he is a serf, who forgets himself, in a dream that he is king, when he might be a free man."

Thus far Savigny.¹ What he was censuring was the Code Napoleon, and all similar productions. That his opinion was entitled to respect, will be universally conceded; and it is true that in this particular instance his views had a very wide and lasting influence. In his own country no jurist has ever stood so high; nor has any jurist of his country ever acquired such a reputation abroad. His knowledge of the civil law was profound and critical; nor was he inferior to any of his contemporaries in his acquaintance with the commercial

¹ Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft. Heidelberg, 1814.

des of Europe. He was the first in his own country to treat the law in a purely philosophical manner. Abandoning the mechanical system of writing on the law, the method of crowning every sentence in a sea of citations, his purpose was to present the spirit of the law; for he supposed that there was no law which had not a reason for its existence; and that reason he sought in the manner of its coming into existence, and the manner in which its existence had been preserved. He was of what is called the historical school of jurists, and he is usually regarded as being at the head of that school.

If the French Revolution had only been a tumultuous outbreak of popular violence, it would have received and deserved less attention than has been given to it. But it afforded a narrow field in which many theories, invented or accepted by men of reflection and genius, being put into practical operation, met in deadly conflict, and ran their various and most unproductive courses. The discontent which brought about the Revolution found its seat in the laws by which the people were governed. Other evils there were, but these were the most obvious; and all other evils seemed to be imbedded in the law, or to have found an ally in the law. It was therefore that all reformers, philosophers, and the entire galvanx of the hopeful and discontented directed all their attacks on the fabric of the law. They did not wish for an overthrow of law. They wanted a change of laws, which would bring some longed-for enjoyment and peace. The revolution, begun in this spirit, was true to its original impulse. The old government was uprooted by legal proceedings; and the new governments kept themselves alive by laws which were designed to meet exigencies deemed hostile to their continuance. If men, women and children passed daily out to the guillotine, it was under the fixed rules of positive laws. They were regularly tried, and tried by jury. As men lost faith in everything else, their faith in the omnipotence of the law seemed to increase. It was a time when the law was worshipped blindly, wholly, madly. The law could distinguish the traitor though he had uttered never

a word; his name, his connection, his associates, his carriage, something undefined, would suffice to reveal his true character to the Argus-eyed law. The law could fix the price of bread, could uproot the most ancient beliefs, could give a fictitious value to bits of paper called money.

Had there been no law, the people would have been infinitely better off. A fierce riot might have ended the matter. But as it was, men laid everything at the door of the law, which was only working out a great and necessary purification. All sense of individual responsibility was gone. In view of the results we may say that, past all war, famine and pestilence, when it is needed to impose the last degree of agony on a people, recourse must be had to the strong arm of the law. Cities have been destroyed by fire and sword in a night; but the prolonged and keen anguish of the French revolution has had no parallel. And was this what Rousseau had dreamed in the idyllic days at *Les Charmettes*, or what he had proposed to the Academy of Dijon as the peaceful solution of all human affairs, the goal of all philosophical endeavor?

And what was the cause of this dire catastrophe? Possibly it was nothing more than this, that the people had broken away from all the traditions of the past. They were attempting to reduce to practice theories fair to the view, but new and untried. Their failure might not prove their worthlessness, but only the unfitness of the people to receive them. That question might remain open; but still the mistake would be none the less, for it is the duty of the reformer to consider not only the abstract quality of his theories, but also the conditions under which they are to be introduced.

That the excesses of the Revolution should be succeeded by a reaction was what might have been expected. How quickly that reaction set in in England is well known. It went to great extremes, and produced new evils of its own. The champions of the perfectibility of humanity subsided into an humble attitude; the friends of free government dropped off one by one; if they went not over to the other side, they spoke more distrustingly, changing their mode of

ech, attaching subtle conditions, clothing their propositions in hypothetical forms, where they had previously assumed a dogmatic tone. Old evils were preferred to the ward of new remedies. Indeed old evils were preferred in the sort for their own sake. Such as they were, our fathers had known them; antiquity had hallowed them; they were the heirlooms of humanity, enveloped with the fragrant memories of the past.

In France the natural course of events was disturbed by a prodigy. Napoleon arrested the reaction in the beginning of his career, and communicated to public sentiment an impulse of his own. Succeeding to a popular government, his power was necessarily extensive, because he succeeded to the vague and unlimited power of the people. What he desired was conquest abroad and peace at home, and for these joint ends he required a strong government. The legal system had not quite spent its force. He determined to gratify himself by a novelty of his own. Doubtless his chief object was to concentrate power in his own hands in a permanent manner. To do this by detail would be to develop a race of legal critics, who would follow every change in the laws with assurance and melancholy foreboding; to work out a general reformation of the laws would baffle the lighter spirits which were only on details, would give a wider scope for the main purpose, would excite a greater admiration among his adherents; and it was more in accordance with his genius to do things on a large scale than on a small one. He desired to be the founder of a new order of things, and to leave the old system as much out of sight as possible. The important work of preparing a code, which was a part of his plan, was committed to four men, Tronchet, Malleville, Portalis and Sieyès-Preameneu. Considering the vast extent of legal science, the intricacy and delicacy of the undertaking, one would think that the extremest limits of human life would hardly suffice for such a task; but such was the impatience of the conqueror by whom the project was conceived, that in little more than four months the draft of the code was complete. It is perhaps needless to say that this dizzy speed

was incompatible with the highest attainment in the work of reducing law to a written system; yet the code thus prepared was found to be so much better than no code at all, that no change of government has ever displaced it. It has grown continually in favor, and it will no doubt remain for a long period of time as the foundation of French jurisprudence. At present, opposition to it in France is a thing quite unknown.

The doctrine of the French Revolution found at first many of its warmest adherents in Germany; but the sympathy and enthusiasm on that side were but of a trivial date, doomed to disappear before the international complications which ensued. During the long wars of Napoleon, the governments of the country animated the valor of the people by promises of reform, which was to be worked out as soon as peace should admit of attention being given to internal affairs; but when at last the war was ended, the promises were forgotten by all except those in whose favor they were made; and such was the general exhaustion that they made but little expostulation. The experience of the century so far was decidedly on the side of conservatism, and those who found themselves in power made the most of the argument. When Thibaut became the advocate of a codification of the laws, he hardly received the countenance which might have been expected in view of his great learning and reputation as a jurist, which were only inferior to those of Savigny. He had good grounds for urging his proposed reform. It was conceded that the laws were in a state of great confusion. From the days of Justinian down, there had been no attempt at any methodical arrangement. For this rude and unintelligible chaos, Thibaut proposed a code, "which should be simple and rational, accessible to every mind, even the most mediocre, in which lawyers and judges could behold in every case the living law before them."

This was aiming rather high perhaps; but it was not that feature of his plans which created opposition. Perhaps he used enthusiastic language in order to secure friends to his cause. But the tide was against him. The government had

much fear of this innovation as if it had been an incipient act of treason. The existing state of things was good enough. What might come with an era of general legislation could not be divined with perfect certainty. It was easier to start the legislative machine than to stop it. The question became a political one; and from that moment its practical solution depended more upon passion and prejudice than upon the dictates of reason. The bar everywhere is naturally conservative to a fault, and is rarely disposed to favor extensive innovation; but in this case, the bar, being dependent on the government, reflected in the main the policy of the government. But notwithstanding these adverse surroundings, Thibaut succeeded in rallying a party of his own, composed of such lawyers as were imbued with the spirit of reform, and such of the laity as he could get to understand the question, and to perceive the need for some change in the existing system of jurisprudence, the evils of which he made clearly manifest even to those who were incapable of suggesting any plausible remedy.

That Savigny would favor the proposed remedy was not probable. Belonging to the order of the nobility, his sympathies were strongly on the side of the existing state of things; as a jurist he had been so long immersed in the study of the past that he had become somewhat oblivious of the present. He put by the questions which have often divided students of jurisprudence. Whether the law is educated sympathy, educated utility, or educated conscience, he would not stop to discuss. He was of those who assert that governments are not made; that they make themselves. It might seem easy enough to trace the abuse of the government of a Cæsar or of a Napoleon; but when we should have to consider the infinite number and succession of facts and events that rendered a Cæsar or a Napoleon possible. There are always innumerable ultimate and coöperating causes that we can never discover. Admitting that we can sometimes connect certain causes with their effects, yet we can never be certain that they are controlling causes. From the fact that Savigny deprecated in a general

way all preconceived appliances in matters of law, he is often spoken of as a fatalist; but what he contended for can hardly be identified with fatalism, pure and simple, such as pervades the Greek drama, where supernatural intervention cancelled visible causes, and wrought such effects as could only be ascribed to the will of the gods; nor yet with the modern determinism, which supposes a long and intricate chain of causes upon which the exercise of the human will absolutely depends. Of these two classes of fatalists we have had specimens in the law, as we shall see hereafter; we have had advocates of the divine right of kings, and advocates of a sociology based on natural laws incapable of control, that operate with perfect precision; but Savigny was apparently none of these: he was simply a legal quietist, discrediting the value of human foresight.

The views of Savigny are, in short, these:

A code is inconsistent with all proper ideas of the origin of laws; it is the work of legislation; and in the normal genesis of law, legislation has but little to do. In all countries, whether civilized or savage, the primitive source of law is custom. Given the situation and pursuits of a people, their history and habits, and you have their laws. From out all of the elements of any given social condition there will grow up certain customs, which at the proper time will be transformed into laws. Laws are not the product of scientific research, nor of laborious study; they are simply born as language is born; they form themselves internally in the popular persuasion, externally in the manner of life; which, being established by long observance, gradually clothes itself with legal sanctions. The law thus shaped by custom is the natural form of all law, in the presence of which legislation is something artificial, mechanical, a violation of the order of nature. The law derived from custom, and that derived from legislation are, so to speak, Nature and the physician: Nature should be allowed to take care of herself, to work out her own problems; and the physician should be called in as rarely as possible. His very presence indicates disease. If Nature performs her work slowly, she performs

it well; the work of man is fitful and imperfect. It is not within the compass of human ability to construct a set of rules that shall apply to all classes of men, under all circumstances; and which will not, by reason of their universality and rigid inflexibility, produce in many cases great injustice and oppression. The making of a code exacts a knowledge of every possible human interest, subjected to every conceivable contingency, affected by every relationship that can arise in all the varying exigencies and intricate complications of human affairs. No single individual, no select number of individuals can pretend to such knowledge; it is only the acquirement of many generations of men, continually applying their best sagacity to the actual business of life. It is only thus that the collective wisdom of a community can find expression in the law. If we might by any exercise of our powers of conception suppose a competent code to have been once made, it would only be of transient utility; for there is no absolute standard of legal perfection; the conditions of society are continually changing, and what is a good law for to-day will be a bad law for to-morrow. The legislator, like Penelope, must be always unravelling the web that he has woven. Every change that he makes involves a new experiment, inflicts a sudden wrench on the body politic, and is wrought at the expense of some interest or right of the citizen; whereas the changes introduced by custom keep pace exactly with the changes of society: they respond to the rights and interests of the people just as the mirrored image responds to the object reflected. There is the same difference between laws thus produced and laws which are the result of legislative action, that exists between theory and facts—what men think of facts and the facts themselves. Legislation is empirical: custom is the secret, but active influence of truth, advancing slowly, but surely, and without violent effort; the power of conviction, making itself felt little by little in the hearts of the people; who, yielding to its legitimate influence, annex to it in due time a legal sanction, and thus invest it with a legal form. But before it receives this form, it is binding on the consciences of men, and should be obeyed.

Perhaps it would occur to most persons ~~at once that~~ these views are suited to the ~~infancy of society~~, before men have learned to adapt means to ends in the moral world, and when the development of law must be left to its own chance; but in truth the latest scientific investigator halts at the same difficulties that oppressed the mind of Savigny. Thus the writings of Mr. Herbert Spencer sometimes take on a tone very much the same as that which pervades those of Savigny, though it seems to be more fraught with melancholy; as when he says: "Is it not probable that what in individual organism is improperly, though conveniently, called the *vis medicatrix nature*, may be found to have its analogue in the social organism? And will there not very likely come along with the recognition of this, the consciousness that in both cases the one thing needful is to maintain the conditions under which the natural actions have full play? * * * *

"Given an average defect among the units of a society, and no skilful manipulation of them will prevent that defect from producing its equivalent of bad result. It is possible to change the form of these bad results; it is possible to change the places at which they are manifested; but it is not possible to get rid of them. The belief that faulty character can so organize itself socially as to get out of itself a conduct which is not proportionately faulty, is an utterly baseless belief. You may alter the incidence of the mischief, but the amount of it must inevitably be borne somewhere."^a

Thus it is that extremes meet; and that pessimists and optimists find themselves substantially on the same ground. Spencer says in effect that evil is in the world; it always has been in the world, and it always will be. In old times society had its thieves and murderers; and we have them still in spite of the acts of Parliament. All that we can do is to take a burden off one man's shoulders by laying it on the shoulders of some other man; but what good is there in that?

"Let what is broken so remain;
The Gods are hard to reconcile."

Though Savigny expresses himself with the hopefulness of

^aThe Study of Sociology, Ch. I.

advocate, yet he is at heart equally disconsolate; trusting, the one sorely bereaved, to such changes as time and chance may bring about. The prime evils of social life are so interwoven with the fabric of life that they cannot be detached; and under all the circumstances the best thing to be done, is to possess our souls in patience, lest in trying to cure our evils we make them worse. The hope that he held out was exceedingly vague, and amounted to something like trusting in what is called luck. He thought that the social evils of his time were to be traced to a spirit of restless uneasiness, which was prone to discontent with the old ways. Rousseau would have gone back to pre-historic man to find the lost happiness of our race; but Savigny reverted only to the Middle Ages as the time when the true science of law was best adapted to practice. His plea was simply for idleness, non-interference, and indifference as to the adaptation of law to any particular end. Why, if this doctrine was true, he did not contend that the fallow lands, if left alone, would produce corn, instead of weeds; that children left to themselves would usually grow up into wise and virtuous men; that men who drift carelessly through the world are generally overtaken by good fortune, does not appear.

There was no little artifice in the reference to popular customs as the best source of law; a sort of oblique homage to the people. Reformers and demagogues had always claimed on the subject of the *vox populi*, the unerring wisdom of the instincts of the people; and here the friend of the prerogative seemed to be making use of the same argument; but he must have known full well that he and they were talking about two different things. They were talking about what the people think; while he was talking about what they should do. The people think what they please; but they know what they must; and it was clearly no argument that because in former times the people had conformed to customs or laws which they were not at liberty to disregard, they should never seek any change, but should wait listlessly after the lapse of some ages the structure of society would be so altered that the old customs would fall away,

because there would be no longer anything to which they could attach.

It may seem strange to us that any jurist should ever have made so much of custom as an element in the development of law. We live in a country where custom performs but an insignificant part in that way; everything is new, except the old laws, which we inherited ready made from the motherland; but in Germany customary laws made up a large part of the jurisprudence of the country; and it is a common thing to find lawyers praising that particular kind of laws with which they happen to be most familiar, especially if they have about them the flavor of antiquity. Thus Cicero found more wisdom in the Twelve Tables than in all the other books that were ever written; thus Savigny, in another work, says that "lavish encomium always forms a part of every elaborate treatise on the Civil Law;"³ and thus it is that the writers on the Common Law always spoke of it as being the perfection of reason. It is not strange therefore that in a country where a great part of the law depended on ancient customs, lawyers should be found—and Savigny was not alone in this—who regarded the *jus moribus constitutum* as preëminently entitled to respect.

It is doubtless true that in early times, during which customary laws were almost the only laws that had an existence, the laws were more simple than they are at present; but that did not depend on the source from which they were derived, but on the simpler elements of the society in which they prevailed. If we could suppose such societies as making laws by conscious legislation, we can hardly conclude that their laws would have had the complexity of modern jurisprudence; and there is every reason to think that they would have been simpler than they were, as the laws could hardly have been reduced to regular form without cutting away some redundancies. The proposition is glanced at that the people were more innocent in their lives because the laws were simpler; but this, if it be true that the people were more innocent, is

³ Das Recht des Besitzes.

vidently mistaking a cause for an effect. We may imagine a community of such virtues as to make laws unnecessary.⁴ Savigny compares the intervention of legislation to the case where a physician is called in to prescribe for a patient; the demand for legislation being a sign that the body politic is not in a healthy condition. That, however, may be asserted of the introduction of any new law, or modification of existing law, whether by custom or otherwise; as in every such instance there either exists, or is assumed to exist, an evil of some kind for which a new remedy is required. He readily admitted that the law should continually be undergoing a change in order to meet the demands of the ever-changing conditions of social life; one of his objections to code making being that the lifeless stability of a code is sadly at variance with the mutability that society must continually exhibit. There was, therefore, no question, on his own showing, but that there is an ever recurring need for calling in the doctor; and the only question at the bottom of the controversy was to what doctor should be called in. Although he proposed that the laws should be left to take care of themselves to a large extent, he probably did not mean to assert that if men will cease to interfere with social ills, they will in due

Mr Thomas More was an accomplished lawyer; but in his *Utopia* he has no more to say of laws than this: "Every one of them is skilled in their

It is a very short study, and the plainest meaning of which words capable, is ever the sense of it." Book II. If they were not fertile laws, they were certainly the inventors of one financial scheme that has been extensively adopted in this country; without, however, diffusing that general happiness among the people that might have been expected from the source from which it has been derived: a fact that possibly be imputed to the failure on the part of certain persons to act as the class of Utopians referred to in the last sentence.

Following extract are said to have acted. The author says:

Great part of their property is in bonds; but in their contracts no individual is bound, but a *whole town*. These towns collect it from their individual debtors, lay it up in their public chamber, or enjoy the use of it the Utopians call for it; who prefer leaving it in the hands of those who make advantage of it, to calling for it themselves. *But if they see any others stand more in need of it, they call it in and lend it to*

Id.

course of time cure themselves; but he rather meant to assert that every evil as it arises will suggest to the people, who are most concerned in the matter, the peculiar remedy, which, under all the circumstances of time and place, is most expedient, and which, by a natural instinct of preservation, they will be forced to adopt.

Mere customs can exercise no more than a moral restraint; men may dissent from them on the ground of public utility, or on the ground of private advantage; running therein no other risk than that of falling under the censure of public opinion: a sanction of so feeble a quality that it has been found to be wholly inadequate to control the conduct of men. In order to meet this difficulty, Savigny's system contemplated that sooner or later existing and thoroughly tried and established customs should be made obligatory by the application of legal sanctions; and as he was opposed to legislation in general, it would follow that he favored the application of these sanctions by the courts, thus preferring judge made law to statute law. The assumption that customs thus recognized would be more flexible than statutes, seems to have been a mere delusion. Statutes do not have that unflinching quality which was attributed to them. The courts regard words used by legislators as being the counters of wise men, and not the coin of fools; and every day it happens that cases within the letter of the statute are released from its operation, because they are not within its spirit; and because they were apparently not within the contemplation of the legislative mind. On the other hand, no laws are so rigid as those which have been imposed by custom; of which we may take the unbending feudal laws as an example; or the commercial customs regulating the days of grace, demand, protest, and notice of negotiable instruments. If it be true that statute law consists of hard general rules, the effect of which is sometimes to impale some victim, under special circumstances within a prescribed command of the law, but which were not contemplated by the legislator, and which, if it had been possible to foresee them, would have induced the legislator to qualify the general rule as applicable to that special

case, and to all others of that particular species, the same thing is true of customary law. Nowhere is the desired plasticity of the law to be found ; and if it could be found it would only prove to be a dire-misfortune ; for what is applauded as flexibility is also known under the less flattering title of uncertainty, than which the law knows no greater imperfection. Instead of being a source of regret that the law tends to harden itself into fixed rules, this natural process should be regarded as the development and growing perfection of the law ; for laws are not made, as it would seem sometimes to be supposed, merely to decide causes, but to guide men in their conduct through life ; and men cannot guide themselves by the law unless it is possible to know what the law is ; and it is not possible to know the law, unless it is made up of certain fixed rules. If these rules are well defined, they may be hard in certain respects ; but their sting may be taken away by conformity. It will not do to say that because the courts adopt customs which have become notorious, or which are proved to have existed in certain cases, they are therefore at liberty to adopt them in one case and reject them in another ; for this would be to leave the community at the discretion of the judge, which for uncertainty was compared by Selden to the chancellor's foot. Unless in countries where the most arbitrary governments prevail, the usual concomitant of a low state of civilization, the decision of causes without reference to former decisions is a thing necessarily unknown ; for justice demands adherence to rules once pronounced, upon which men have been induced to act ; and courts are dominated by the same estoppels that they are compelled to impose on others. Continual reiteration of a custom, repeated adjudications of the same principles, have, in respect to the flexibility of the law, precisely the same effect as legislation ; only legislation arrives at the result of fixed rules that may be understood, and hence obeyed, at once ; whereas custom and judicial law must undergo a slower process of development. If left alone they will at last, after much conflict, doubt and uncertainty, become equally rigid as the statute law. If we are to have well-defined and uni-

form rules, it matters not whether they are imposed by custom, by judicial decision, or by the will of the legislator; and the only choice would seem to consist in the degree of notoriety which may attend these several kinds of laws; and in that respect it must be admitted that statute law has a decided advantage. The argument against legislation overlooks the innumerable benefits that have been conferred on humanity by legislation, and seems to deny to man that foresight and power of adapting means to ends which is never denied in respect of any of his other performances. If men form customs, it is with a view to future convenience; if judges decide causes, it is in view of future effects, or of those principles which are supposed to be beneficial in all time. Men live habitually in the future; and to suppose that they act in anything without reference to the hereafter is to mistake the essential character of the race. It is therefore an error to apprehend that the gradual growth of customs, or the formation of rules by judicial decision has anything of unconsciousness about it. There is no more unconsciousness in either case than enters into the building of a house, or of a city. The workman in either case may not have a thorough idea of the results of each particular act; but he does have a general idea, and all the time he is endeavoring to realize a conception of some kind. The great number of persons, the long lapse of time mark no essential distinction; for co-operation in mental and moral work is quite as usual as in physical work; and in both kinds of work one generation carries on what a previous generation had left unfinished. There is, therefore, no great difference in the process by which laws are established so far as mere mental action is concerned. To say that the laws ought to be changed only very slowly, that by custom they can only be changed slowly, and that therefore reliance should be placed alone on custom, is tacitly to assert that the existing laws are good, that they are best suited to promote the happiness of the community; whereas we know that very often this is not the case. To assert that no good can be done by legislation is to assert that though men may consciously make good rules for

ir guidance when they are not specially trying to do so, that they lose this faculty the moment that they give their best attention to the task.

It would seem that laws formed in an accidental way, though with a definite purpose, and which are called custom-laws, have no certain guaranty of being of advantage to the community. They proceed not uncommonly from excessive power, and excessive greed. To this remark there is however an important exception. There are certain usages and customs of classes of men, engaged in special pursuits, such as commercial customs, the customs of the stock exchange, and the like, which are founded in the convenience of the parties most interested in those pursuits; and it must be admitted (without admitting that they should not be rendered illicit by statute) that in such matters the utility of customs cannot be denied. All men of the same calling in life in the same community form a kind of guild, which exercises a sort of legislative power over its own members; and which is usually confined to such matters as no special provision has been made for in the general body of the laws. Such customs, however established, resemble the by-laws made by municipalities or other corporations; they have their origin in, and are governed by, the same corporate spirit. All the members of the guild have a special and technical knowledge of its internal affairs that cannot be rivalled by a stranger to its duties and interests. This legislation is doubtless often the result of express convention, manifested in some form or other, surviving long after the convention is lost or forgotten. To suppose that the laws of a country could be thus made would be to ignore the fact that a community represents exceedingly varied and conflicting interests; that in most acts and pursuits of life no spontaneous concert of action can be expected; that there is an antagonism between the interests of different classes that must be controlled by something more regular than a mere trial of physical forces, and that must be made to yield something better than a succession of hostilities and injuries, full of mischief to the parties and of evil to society at large; and also the fact that the customs here referred to

are only beneficial because they supplement the law in cases unprovided for; proving therein, not the inutility of legislation, but the incompetency of the legislator to deal successfully with details with which most men are more or less unfamiliar.

It is not true that customary law is commonly more simple than law otherwise derived; the reverse appears to be true. As evidence of this we have only to look to the customs of the feudal period, which, in so far as they survive, still constitute the most difficult part of our own laws. Popular customs are usually embodied in ceremonials, and are shown forth by symbols. It is in vain that we seek here that simplicity that we desire. The livery of seisin is less simple than our modern conveyance; and the livery of seisin was one of the simplest of all the old customs by which ownership was confirmed. If we take the simplest transactions of a people among whom customary law prevails, we shall find that they are tortured into mystery, and that everywhere an undue stress is laid on things that are wholly irrelevant. It would be easy to illustrate this statement by a multitude of instances.

What is mistaken for simplicity is the absence of law, for which anarchy is substituted. One may simplify any science by leaving a great part of it out; as any one may find by examining the current school geographies. There are some who seriously propose to take the same course with the law. Growing weary of the vast and increasing extent of legal rules, they dream that they can get rid of the labor and difficulty which they bring in their train, by abolishing all but those that are most conspicuous, and of the most sweeping import. For all that which is thus erased, they offer vague references to the principles of natural justice, which are so ill-defined that a large school of jurists, after abundant reflection, deny their very existence, except as based on general utility, the discovery of which in many cases requires the finest mental discipline, the most logical thought, the most prolonged and painful attention. They forget that the continual expansion of the science of law, is made up of new

conquests over territory that was formerly given up to doubt and ignorance. They seem to regard the law as something notional, instead of being something logical; as something casual instead of something regular and persistent. The law would thus cease to be a science, or anything that could be stated or comprehended. The discretion of the judge would at last be a law, however exercised; but it would be a law the existence and application of which could not be foreseen; a law which would not bind the judge in any future case of the same kind; a law that would still leave the future open to doubt and contention; a law for one case, and no more. The proposition is to simplify the law by mutilating it; to make it inadequate to the emergencies that actually exist; to simplify a man by cutting off his arms and legs; to make a four-fingered glove for a five-fingered hand; to substitute discretion and caprice for fixed rules. The disastrous effect of this theory has often been exemplified. When the Province of Dauphiny was annexed to the French crown, the people sent a delegation to the king, with a prayer that the judges might be forbidden to decide cases according to equity. If it is admitted that hard cases will arise under the statutes, it must be also conceded that it is judiciary law that most frequently impales an innocent victim. Being necessarily retrospective, it often punishes the citizen, not because he has failed to keep some rule of law, but because he has not been wiser than the courts, which reach conclusions through difficulty, and express them with doubt; or because the case in hand suggests the necessity of a new rule, or the partial or total abandonment of an old one. Every case at first impression exacts that a decision *ex post facto* shall be made; every decision that overrules a previous decision, punishes the citizen because he has conformed to the law previously announced. The courts in such cases say that the prior ruling was not law; but how could the citizen know that it was not law, when the court said that it was law? Here we perceive a peculiar kind of inflexibility in judiciary law, which is absent from statutory law. The courts cannot say, "the former decision was wrong; but as this man was

innocently misled by it, we will not punish him for that; we will decide this case in his favor; but we will here announce that hereafter we shall hold the rule the other way; and now all men may take fair warning;" for that would be to usurp legislative power, and no one would be under any obligation to respect a rule thus announced. As the courts feel a natural repugnance to decide away one's rights simply because he has abided in good faith some former decision, and has lived up to it, they often continue to adhere to rules that they admit to be erroneous, saying that they cannot disturb rules of property, or that if the question were a new one, it would receive another answer. Such utterances from the bench are common. There is no such difficulty in the case of statutes, which can, and usually do, provide for the future only.

Every one is presumed to know the law. This is a fundamental maxim in every system of jurisprudence. It seems to be a necessary one. It is that on which Nature acts, Nature that punishes ignorance as if it were a crime; and that makes no exceptions. In both cases that is assumed which cannot possibly exist. The hardship of such a rule is often painfully apparent; but its absolute necessity, unless in very exceptional cases, is none the less so. There seems to be here an injustice that discredits the integrity of the law in all its parts. The hope of simplifying the law is hence a natural and human one; but we cannot simplify it by any act of obliteration. We can only have the choice here of having the law so that we may know it before we act, if we are inclined that way, or of feeling it in its effects on our past actions for the first time. Do what we will, there will always remain an appalling difficulty. No study is more laborious than that of the law. Its foundations are laid in the most metaphysical abstractions that the human mind has ever essayed to grasp; its beginning is lost in the night of the past; it bears in itself the impressions of a thousand generations, whose theories of life have been discordant and diverse; its dominion is as wide as the interests of mankind; its influence as profound as the current of human life; its

blems involve every possible complication of human affairs, diversified by every variety of circumstances of time and place. One might as well talk of putting the sea into a glass cup, as to talk of rendering such a science simple and easy of comprehension. There is no royal road to learning; and we must be content to do without that which royalty cannot compass; and must put up with the inevitable.' We will never make the law a thing of six easy lessons, however desirable it might be to have it so. The fault is not with lawyers, but it is inherent in the matter. Perhaps no work outside of the department of pure philosophy contains more abstruse research than Mr. Fearne's *Essay on Contingent Remainders*. The reason of the difficulty there is in understanding it, is simply that there are such things as contingent remainders. Lawyers have not made them; they are a reason of existence of their own. They differ from every other kind of estates; they are created to take effect in the future; the men who create them do not foresee what the future will bring about; and they have not always very clear ideas of the probable nature of the circumstances and contingencies to which they refer; nor do they always express their ideas with much clearness, even when the ideas themselves are clear. Out of these elements, and others of a like kind, the most perplexing questions will certainly arise. If any one should take Mr. Fearne's work, abolish all its principles, and build up new ones of his own, he would find in the end that he had another system quite as difficult as that which he had destroyed, or else one insufficient for the demands to be made upon it, and which some one else would have to piece out as occasion might require. To build up any system on the subject exacts immense labor, and a vast outlay of time. It is only a vulgar error to suppose that in the accomplishment of such a work, the conception of abstract justice is lost sight of; for every extension of a legal principle forms a new test of the validity of the fundamental principles of justice on which it is based, just as an increased height of a wall tries the strength of its foundation. Therefore it is that the most finished and best elab-

orated systems of laws are the most just and equitable. To suppose that the jurist will lose sight of the quality of justice in the midst of his studies, is no more reasonable than it would be to suppose that an architect, in the study of his profession, would forget that houses are built for the comfort and convenience of the people who are to live in them. And yet it is on some such idea that justice is best promoted by abstaining from any critical study, that a preference for customary and case law is founded.

One good thing about public opinion is that it is always in advance of private morals, just in so far as men pretend to be better than they are. Hence it has a tendency to drag private morals up to its asserted standard. Exactly what relation should subsist between the law and the morals of a community, is not an easy question. If the laws set up too high a standard, they produce revolt. The puritanism of the Commonwealth is followed by the licentiousness of the Restoration. If the standard is too low, the law seems to encourage that which it could not favor. It is the fault of all customary law that it cannot rise above the level of its source. It cannot speak the sentiments of the wiser few, for it is not dictated from above, but ascends from below.

But the most serious error committed by Savigny was in supposing that there is anything inherent in custom that is necessarily beneficial to humanity. On this subject Mr. Austin says: "If the people be enlightened and strong, custom, like law, will commonly be consonant to their wishes and interests. If they be ignorant and weak, custom, as well as law, will commonly be against them. During the Middle Ages the body of the people throughout Europe were in the serf or slavish condition. And this slavish condition of the body of the people originated in custom: although the imperfect rights which custom gave to their masters, together with the imperfect obligations which custom imposed on themselves, were afterwards enforced by law, of which that custom was the basis. In various parts of Europe the people have gradually escaped from the servile condition through successive acts of the legislature. So that the body of the

ple in many of the European nations have been released from direct legislation from the servile and abject thralldom in which they had been held by custom; and by law founded custom in Rome, the absolute dominion of the *paterfamilias* over his wife and descendants, arose from custom, and consequently customary law, and was gradually abridged by direct legislation: namely, by the edicts of the pretors, the laws of the people, and the edictal constitutions of the Emperors. Let us turn our eyes in what direction we may, we shall find that there is no natural connection between customary law and the well-being of the many."⁵

Shakspeare also said:

"What custom wills, in all things should we do't,
The dust on antique time would lie unswept,
And mountainous error be too highly heaped
For truth to overpeer."—*Coriolanus, Act II, Sc. III.*

The theory of Savigny being that custom should largely form the basis of the law, it is evident that this consideration must address itself as well to the legislative power as to the courts. It therefore afforded no argument against legislation in general thing, though it might furnish a timely admonition as to the true science of legislation. Had he used his own reasons as an argument against hasty and indiscreet legislation, he would have occupied the same position in regard to the matter which Lord Bacon did, whose exceedingly wise and well-considered language, by a coincidence of thought, would seem to have anticipated all that Savigny said, and to have been intended as a direct reply to it, marking even the very illustrations which Savigny used long after Bacon had been reposing from the troubles of his vexed and unblest life in the sanctuary of the tomb.

Lord Bacon says:

Surely every medicine is an innovation, and he that will apply new remedies must expect new evils; for time is the greatest innovator; and if time of course alter things to the worse, and wisdom and counsel shall not alter them to the

better, what shall be the end? It is true that what is settled by custom, though it be not good, yet at least, it is fit; and those things which have long gone together are, as it were, confederate within themselves; whereas new things piece not so well; but though they help by their utility, yet they trouble by their inconformity; besides, they are like strangers, more admired and less favored. All this is true, if time stood still; which contrariwise moveth so round, that a forward retention of custom is as turbulent a thing as an innovation; and they that reverence too much old times are but a scorn to the new. It were good, therefore, that man, in these innovations, would follow the example of time himself, which indeed innovateth greatly, but quietly, and by degrees scarce to be perceived; for otherwise, whatsoever is new is unlooked for; and ever it mends some, and pairs others; and he that is holpen takes it for fortune, and he that is hurt for a wrong, and imputeth it to the author. It is good also not to try experiments in states, except the necessity be urgent, or the utility evident; and well to beware that it be the reformation that draweth on the change, and not the desire of change that pretendeth the reformation: and lastly, that the novelty, though it be not rejected, yet be held for a suspect; and, as the Scripture saith, 'that we make a stand upon the ancient way, look about us, and discover what is the straight and right way, and so to walk in it.'"⁶

There is no doubt but that there may be found among those who favor codification, some who desire by this method to introduce many changes into the body of the law. If they should ever succeed, the law would be made to represent individual characteristics, rather than the approved common sense of the community. But the most intelligent friends of codification do not favor any sudden innovation in the substance of the law. They only propose to reduce the scattered fragments of the law into a system, and to make that system as plain, intelligible and harmonious as possible; to concern themselves with the evidence and outer form of the law alone. Their contention is that at present it requires

⁶ Essays, "Of Innovation."

more labor and time no find the law than it does to comprehend it; that our law books are made up in great part of disputations, each of which could be forever and profitably silenced by a few authoritative words. We are dependent for the most of our law on many volumes of judicial decisions; and as no two judges will express the same principle in the same words, there is a continual dispute as to what the law is, growing solely out of nice distinctions of the meaning of language. In seeking to introduce order in the place of confusion, certainty in the place of doubt, the codifier may be the most conservative of men, without the slightest inconsistency. He is, in truth, very like to be called a theorist; but that is only a party cry. The contempt of Napoleon for theorists was unbounded; he called them ideologists, and the word was ever on his lips, as expressive of his utmost disapproval; but he regarded a code as the result of a manly and practical effort to cope with a great and serious difficulty.

It is not true, as suggested by Mr. Spencer, that we cannot get rid of any evil by legislation; nor that the laws cannot be any better than the people who make them; nor that if we remedy one evil, we thereby produce inevitably its equivalent evil of some other kind. There are fewer thieves than there would have been if there had never been any law against larceny; and no collateral ill consequences follow from the suppression of this crime. The law exacts great care at the hands of carriers of passengers; but without inflicting any hardship; for the carrier should use great care if there was no law on the subject. The laws are often better than the people who make them. At the beginning Rome was but a nest of robbers; during the entire period of her dominion the government was sustained by an enormous system of spoliation; while society exhibited internally an amount of corruption that has never been equalled; and yet from these unfavorable conditions was derived the civil law, which is admitted to manifest in many respects a loftier and purer spirit of equity than pervades the jurisprudence of modern Christian nations. It has even been suggested that if a company of the most wicked and abandoned men could be placed on an

island by themselves, they would enact laws for the suppression of vice and crime of the most stringent character. This they would do for their own mutual protection. These laws would react on the community, and would produce beneficial effects; and the people would be better with these laws than without them. Mr. Spencer seems to forget that laws are dictated not only by morality, but also by a sense of utility; and that an enlightened sense of utility will, in the science of legislation, supply, in a great measure, the want of purity of morals. Supposing a purpose in the universe, as most persons do, it would seem that the business of law making is too important for the welfare of mankind to be left to a sense of morals or to a sense of utility alone.

When Mr. Spencer comes to speak of the subject of codification, his observations are less open to criticism. What he says is this:

"Of penal statutes alone, which are assumed to be known by every citizen, 14,408 had been enacted from the time of Edward III down to 1844. As was said by Lord Cranworth in the House of Peers, 16th February, 1853, the judges were supposed to be acquainted with all these laws, but, in fact, no human mind could master them, and ignorance had ceased to be a disgrace. To this has to be added the accumulation of civil laws, similarly multitudinous, involved, unclassified, and to this again the enormous mass of 'case law,' filling over 1,200 volumes, and rapidly increasing, before there can be formed an idea of the chaos. Consider next, how there has come this chaos, out of which not even the highest legal functionaries, much less the lower functionaries, much less the ordinary citizens, can educe definite conclusions. Session after session the confusion has been worse confounded by the passing of separate acts, and amendments of acts, which are left unconnected with the multitudinous kindred acts and amendments that lie scattered through the accumulated records of centuries. Suppose a trader should make, day by day, separate memoranda of his transactions with A, B, C, and the rest of his debtors and creditors. Suppose he should stick these on a file, one after another, as they were made,

even putting them in order, much less entering them in the ledger. Suppose he should thus go on through his life, and that, to learn the state of his account with A, B, or C, his clerks had to search through this enormous confused mass of memoranda, being helped only by their memories, and through certain private note-books which preceding clerks had left behind them. What would be the state of the business? What chance would A, B, and C, have of being rightly dealt with?

Yet this, which, as a method of conducting private business, is almost too ludicrous for fiction, is in public business nothing more than a grave fact. And the result of the present system is exactly the one to be anticipated. Counsels' opinions differing, authorities contradicting one another, cases at issue, courts in collision. The conflict extends all the way through the system from top to bottom. Every day's law practice reminds us that each decision given is so uncertain, that the probability of appeal depends chiefly on the courage and pecuniary ability of the beaten litigant, not on the nature of the decision; and if an appeal is made, a reversal of the decision is looked for as by no means unlikely."

In respect of statutes, we are in this country in a better position than the people of England. Our statutes are digested and revised. But on the whole there is reason to suppose that our jurisprudence exhibits quite as great a chaos as that of any other country. In addition to all her hundreds of laws, we have several thousand of our own; and the number increases with alarming rapidity. Our usual method of ascertaining a legal principle is to begin with some decision in the early reports of England, say in Lord Raymond, or Coke; then to trace it down through all the English reports to the present day; then we begin on this side the water, and pass from state after state, finding here that the principle has been denied, there that it has been affirmed, here that it has been glanced at, there that it has been stated as an exception to the other rule: in one place that it has been dwarfed by another, in another that it has been enlarged in the same way. If the courts are not agreed, the reports are not always trustworthy.

— *Journal of Sociology.*

worthy. By the time that we get done, the principle is pretty well fagged out; and the enquirer is well-nigh swamped in a historical investigation of the utmost intricacy and perplexity, requiring a large appropriation of time, a great amount of study, and the utmost critical accuracy, to say nothing of the use of an immense library.

The evil has grown since the days of Savigny, and since the time that Carlyle spoke of codifiers as quacks and mountebanks. Most reflecting persons foresee that the present system cannot go on forever; and that whether there shall be codification or not, is not altogether a question of choice. The practical difficulties in the way of codification are very great; but it has always been found in countries where it has been tried that they are greater in anticipation than in reality. The late public address of the Lord Chief Justice of England,⁸ in which he takes strong ground in favor of codification, is a very significant indication as to the change of public sentiment that has taken place on this subject; and it points to practical results that cannot long be postponed. We of the present generation shall hardly live to see them; but it demands no strong effort to anticipate a day when the most of our now almost innumerable law books, which cannot now be read for number, shall be consigned to oblivion.

It will be found on examination that most of the arguments urged against codification run back at last to the quietism of Savigny; to the assumption that if the law is only left to itself it will take care of itself; that it possesses some mysterious energy by which it will adapt itself to all the successive wants of society. The law is thus supposed to be endowed with the faculties of a living organism. But positive law is the creation of man; and there is nothing of his creation that is endued with the quality thus ascribed to it. Whatever he makes, he must continually support or repair; otherwise it ceases to perform its functions, and falls into ruin. If this manner of expression were a mere figure of speech; if by saying that the law adapts itself to human needs, it were meant that man adapts it to the ends which he

⁸ 13 Albany Law Journal, p. 266.

s to accomplish; if it were only intended to personify an action, the question would be of no significance; but argument is based on such expressions hostile to legislation, it is perceived that something more than a metaphor is meant. Much that is hazy and indefinite on this subject is found plentifully scattered throughout the law books. I take as an example an extract from one of the last published, Mr. Bishop's treatise on the Law of Married Women. The learned author says:

"The habits of a community and the laws by which it is governed will in some way adjust themselves to each other, whether we think they ought to do so or not. This is a fact: the thinking part of mankind has always observed. The persons who seek to carry what they deem to be reform by the power of the law, instead of first addressing themselves to the habits and seeking to change them by reason and persuasion, consider that the law makes the habits; and they do not shudder to contemplate any change in the law, in itself deemed desirable, however much it may be pushed forward in advance of the desired change in the habits. But experience proves that the habits make the law, not the law the habits; and that it is unnatural, and it is to disturb the just repose of the community, to press forward a reform in either of these directions much in advance of the other."⁹

Thereupon the author proceeds to show through a whole chapter that the married woman's law, as it now stands, is almost unreasonable that could well be conceived; and that it is only rendered tolerable from the fact that men and women do not habitually live in accordance with its theories. The writer says: "One marvels that such a condition of things should be permitted to remain unchanged, generation to generation, among any civilized people."¹⁰ Thus we are told that if the law is to be changed, we must first ply the people with persuasion, in order to induce them to change their habits; and yet that in this instance the habits have long been changed, and still that the supposed

⁹ l. 1, § 881.

¹⁰ § 902.

principle of adjustment has not come into play. Obviously when we speak of customs and habits, we refer to something visible; for we do not, at least in the law, thus refer to mere moods of mind. The misfortune about the theory that the habits should change before the law is changed, is that the habits are controlled by the law, and cannot change until the law is first changed. Suppose, for example, the custom of allowing days of grace on bills and notes to be established by law, obviously the people cannot change their habits in this respect so long as the law remains in force. Whoever should change his habits by disregarding the law, would forfeit his rights, and the law would so declare. The whole community might become convinced that the allowance of days of grace was injurious to the best interests of commerce, but still the courts, which can only declare the law, could do nothing to abolish the rule. Change of habit did not bring about the Habeas Corpus Act. The habit was to go to jail at the king's command. Change of habit did not abolish the system of rotten boroughs. The custom was for the lord to return his member for his private borough. Change of habit did not change the common law system of pleading. The lawyer who attempted innovation in pleading lost his case. The same thing is true of other changes in the law. The law is not usually altered by change of habit, but by change of opinion, operating directly on the law-making power.

But we venture to suggest that in the matter mentioned by Mr. Bishop there has been no change of habit whatever. Men still marry, and women are given in marriage, as aforetime they were. Men still exercise the same visible control over the property of their wives that was exercised by husbands long ago. Modern respect for women dates back to the days of chivalry, and it is perhaps the one valuable thing for which we are indebted to the institution of chivalry. There is indeed a growing opinion that the property of married women should be freed from liability to sale for the debts of their husbands; but this opinion cannot be properly spoken of as a habit of the people; nor can it of itself constitute law. It has no legislative force; and it is one of the blessings

our courts that they are not governed by public opinion. Whenever a new fact or a new event in material progress comes into existence, the courts must first declare the law, and then, thereupon, with such approximations and fictions as they may have on hand; being called on to act before the legislature has had time to take the necessary bearings of the situation, and to formulate general rules to govern the future. Afterwards, when the matter has gone through discussion, and public opinion has been formed, the legislature steps in to approve or correct what the courts have done, and to enact such new rules as may seem necessary. Thus it is that the proceedings of the courts register the material changes in a community undergoes, while the legislature registers the legal changes. The judicial reports of England will clearly show the advent of new industries, the progress and expansion of arts, trades, sciences, manufactures, commerce, and so on; but, except by reference to the statutes, they show almost nothing of the changes that have taken place in public sentiment. But the statutes are the oracles of changing public sentiment. By the common law very many criminal offences were punishable with death, apparently in accordance with the philosophy of Arbuthnot that "decent executions kept the world in awe; for which reason the majority of mankind were to be hanged every year;" but by referring to the statute books we find that there was a change of public opinion on the subject, of slow and gradual growth, until at last only two or three offences are thus punishable. The same thing may be observed in the case of all important and permanent changes of public sentiment as to religion, personal liberty, and indeed everything else of which the law takes notice. They are all set down in the statutes; and until they are thus set down, the people must conform to the law, which prevents them from changing it by changing their habits. Means of punishment in some form for a deviation from the law. Evidently whoever should wait for the habits of the people to change the law, would be like the rustic who waited for the river to run by.

M. Comte's theory has received an unfriendly review at

hands of Mr. Austin, and a hostile criticism from Von Ihering. But neither of these writers has noted the truth which his theory undoubtedly contains; a truth fundamental, and of the utmost importance, as we shall endeavor to explain hereafter, in considering another theory of a later date; a most unmistakable truth, capable of buoying up many fallacies, and which, being dexterously used, enabled Savigny to achieve a temporary, but brilliant victory over Thibaut.

U. M. ROSE.

LITTLE ROCK.

THE DARTMOUTH COLLEGE CAUSES AND THE
SUPREME COURT OF THE UNITED STATES.

(No. 2.)

March 10, 1818—four months and four days after the opinion adverse to the majority of the old trustees, in the court—the first of these causes (*Trustees v. Woodward*)—was argued before the full bench of the Federal Supreme Court at Washington. On March 12, 1818, the arguments closed, and the judges went into consultation. Notwithstanding the effect of the contrast between the impotence in preparation and weakness in argument displayed on the part of the state, and the great weight of the elaborated argument of Smith - Webster argument, and the eloquence and greatness of Webster's great effort, that conference revealed to the judges—an anomalous state of things in that tribunal on a great constitutional question—that they could agree on nothing, that no judgment could be rendered, and that the cause must be continued to the February term, 1819—next year.

Two of the seven judges were undecided; Story had not yet pronounced his opinion adverse to the plaintiffs; and the remaining four members of the court were equally divided. At the opening of the court on the morning of March 13, Judge Marshall announced, in general terms, the result of his conference, and that in consequence the cause must be continued. On March 14, 1818, the court adjourned until the next day.

Webster's pet cases, to which we referred in our former argument (*ante* pp. 22, 23, 24,) and to which three-fourths of his argument, as reported by Farrar, was devoted, distinctly marked the point upon which he greatly relied; but they were not only not before the Supreme Court when he made

that argument, but had not reached the circuit court. The United States Circuit Court for New Hampshire was held at Portsmouth and Exeter, and commenced its sessions on May 1, and October 1, respectively. These terms were not only in Judge Story's circuit, but were held as it were almost within ear-shot of his home.

After the continuance of *Trustees v. Woodward*, Webster busied himself in devising means for the transfer of these causes from the May term of the circuit court, 1818, to Washington, in order to "give" them "an earlier standing" upon the docket of the Supreme Court. His purpose, as stated by himself, was to accomplish this by turning an agreement drawn up by counsel, like the one in *Trustees v. Woodward*, into a special verdict, and then inducing Judge Story, the protégé of Mason and great admirer of Webster, and the district judge to disagree *pro forma*, without either argument or decision, and to take the cause up at once to the Supreme Court, upon the formal certificate that the judges "were opposed in opinion." The causes were transferred as Mr. Webster desired, but not until the October term of the circuit court, 1818.

In August, 1818, Webster furnished to Judge Story copies of the arguments of the counsel for the plaintiffs, delivered in March preceding, to be distributed by him to a portion of the judges. These arguments were furnished apparently, partly in the nature of briefs, and partly as campaign documents in reply to the opinion of Chief Justice Richardson in the state court, which had been "widely circulated."

Bad news travels fast. It was impossible for the politicians to conceal under complimentary eulogies of the wit of Holmes, and praises of the brilliant declamation of Wirt, the legal *fiasco* at Washington, from those who had the honor of Wheelock and the interests of the university most at heart. This brought William Pinkney, of Maryland—the only man at the bar of the Supreme Court who could meet Webster upon anything like equal ground,—into these causes, invested with powers almost as absolute as those voluntarily conferred upon Webster by his great associates, and clients. This fact

mediately became known to Judge Story, the counsel for plaintiffs, and their clients. No man knew the judges, their biases, and what he had to contend with in and out of court, better than Pinkney. His first step showed the value of a commander. About the first of November, 1818, he notified the opposing counsel that he should move for a re-argument in *Trustees v. Woodward* and should argue it himself, if the court permitted. It is hardly possible that this was not made known to Story, his great friend and adviser, and to the other judges of the Supreme Court, at any day. Webster and his associates and clients conferred, and took such steps at once as they could to prevent a re-argument.

Pinkney never attempted to argue a cause without the most thorough preparation, and this case was no exception to the rule. The Supreme Court nominally commenced its session on February 1, 1819. In order that nothing necessary to a correct understanding of the cause might escape Pinkney kept Cyrus Perkins at his elbow for a whole week preceding the session. Dr. Perkins was professor of anatomy and surgery in the Medical Department of Dartmouth College. He was an able man; the family physician of Webster, and the devoted friend of Wheelock. He had lived for years in the atmosphere of these troubles, and knew the details of their history by heart, and brought to this conference with Pinkney all the documentary evidence which it was supposed would throw any light upon the subject. On Monday, February 1, 1819, Pinkney went up by pike from Newbury to Washington. As all the judges were not present the court met formally on that day, and adjourned over Tuesday, when the business of the session commenced. As the counsel for the state had no idea that a decision would be made at that time, none of them were present at the opening of the court on Tuesday morning except Pinkney, who sat near the chief justice, watching for an opportunity to open the battle with his motion for a re-argument. The morning of February 2, 1819, the instant the judges had taken their seats, the chief justice turned his "blind ear"

towards Pinkney, (as tradition has it,) and shut off his motion by announcing that the judges had formed opinions during the vacation, and immediately commenced reading his opinion. Judge Todd was absent from sickness; Judge Duvall dissented; the remaining four judges simply "concurred in the result." No other opinion was ever delivered in court of any other judges. Some time after, Judges Washington and Story handed their opinions which appear in the printed volume to the reporter.

Judge Johnson, who, in *Fletcher v. Peck*, 6 Cranch, 87, nine years before, had found himself unable to arrive at any such conclusion, concurred in the reasoning of the chief justice in this case. Judge Livingston concurred, singular as that may seem, for the reasons assigned by the chief justice, and by Washington and Story. The opinion actually delivered by Marshall was in manuscript, in his peculiar handwriting, and on eighteen folio pages.

On February 3, 1819, the chief justice delivered the opinion in the case of the Baptist Association v. Hart's Executors, 4 Wheat. 1, which overthrew the doctrine of charitable uses, etc., in three great states of the Union, and which has since been overturned because it reasoned history out of existence. This cause was argued at the same term with the college case. On February 8th and 9th, *Sturges v. Crowninshield* was argued, and on February 17, 1819, the chief justice delivered the opinion of the court in that case, Judge Livingston not concurring. On February 10 and 11, 1819, the famous New Hampshire case of *Bullard v. Bell* was argued by Pinkney and Webster. The defendant was one of the judges on the New Hampshire bench when the college case was decided by that court. It was one of the Hillsborough Bank cases, of which Judge Bell was president, and involved the question of his individual liability, growing out of certain transactions of the bank. Pinkney was counsel for Bullard, and Webster for Bell. It is the only instance which now occurs to us in which these two legal giants were pitted against each other in that arena. Each did his best. The cause was heard before six judges; each carried one-half the court with him, and the case was never reported.

Soon after the reading of Judge Marshall's opinion, Webster moved that judgment be entered up *nunc pro tunc*, Judge Woodward having deceased since the last term. This motion was opposed by Mr. Pinkney and Mr. Wirt, upon the ground that the other causes then upon the docket embraced additional facts, and that no final judgment should be rendered until all the causes were fully heard.

On February 23, 1819, the court granted the plaintiff's motion. On March 12, 1819, the court adjourned without day, having been in session about six weeks. Before the adjournment, Mr. Pinkney attempted to avail himself of the stipulations which came up with the special verdicts both from the state court and the United States circuit court, that any facts contained in the special verdict might be expunged, and that any new facts might be added, if deemed material for a right decision of the cause. Webster, with characteristic firmness, refused to allow any fact either to be expunged or added. He thus forced a judgment against Judge Woodward, and compelled Pinkney to "consent" that the other causes should be "remanded to the Circuit Court for the District of New Hampshire for further proceedings to be had therein, according to law," without any direction from the Supreme Court.

The old trustees did not wait for the judgment in their favor, but, as soon as the news of Judge Marshall's opinion reached them, made the necessary arrangements, and on February 8, 1819, took possession, by virtue of the law of the strongest, of the college buildings, etc., which up to that time had been held by President Allen, and occupied by the officers and students of the university.

Mr. Webster followed up his judgment, by serving the proper notices upon the adverse parties in the causes in the circuit court, to be ready for trial at the May term, which commenced May 1, 1819. On Saturday, Judge Story delivered an elaborate opinion adverse to the state, in these causes. A judgment *nisi* was then rendered for the plaintiffs, to become absolute unless the defendants, during the May term of the court held in Boston, (commencing May 15, 1819,)

should produce such further evidence as should in the opinion of Judge Story be sufficient cause for further delay. On May 27, 1819, James T. Austin, one of the counsel in the interest of the university in these causes, presented the new facts to Judge Story. The judge took the papers and reserved his decision.

These facts were, in brief, that Dr. Wheelock made no donation to Dartmouth College; that New Hampshire was directly and indirectly the first donor; that the charter did not incorporate the charity school or give the trustees any control over it, etc. Judge Story held that none of the facts varied the case as it had been considered and decided, and that none of them contradicted the recitals of the charter, and ordered judgment and execution upon these suits. Technically this was the end of the college causes.

Webster now devoted his special attention to pushing forward the publication of Farrar's Report, a work that had been for some time on his hands.

If the construction thus given to the clause in relation to the "obligation of contracts" is correct, it should be upheld; but if founded in error, involving as it may vast consequences to millions, it must be overthrown. To determine this question, the decision, in its "inner and outer life," must be analyzed and weighed dispassionately in the light which has since been thrown upon it, uninfluenced by fear or favor, or the shadow of great names, which, like "hard cases," so often "make shipwreck of the law."

Blocks of overruled cases, opinions swathed in confusion and rolled in tangles, and decisions so inconsistent and contradictory that no one can reconcile them, admonish us that other judicial tribunals, however pure, able and learned, are yet human, and may err. We shall assume that the judges of the Federal Supreme Court, in their judicial earth-life, are no exception to the rule. Probably no litigant ever came before that court under circumstances—entirely independent of their merits—so unfavorable for success as the state in

these causes. Judge Wilson, who had special opportunities for knowing the meaning of the "obligation" clause, had been in his grave more than twenty years when the decision was made; apparently the history of this clause, so far as the court and counsel were concerned, was enveloped in total darkness; Judge Marshall naturally believed in a government instructed by the rules of logic, and operated upon rigid mathematical principles; the political aspect which had been forced upon the case, and of which Mr. Webster availed himself with great adroitness in his argument, in the eyes of Marshall transformed this case into another *Marbury v. Madison* (1 Cranch, 137,) which was in reality a judico-political struggle of battle between John Marshall and Thomas Jefferson, the two great Virginians, whose political and personal fate descended with them to the tomb; the counsel for the state were new men in the cause, unfamiliar with the local story and the arguments in the state court, inadequately prepared, ill-assorted and inharmonious, the first immersed in politics, the second overloaded with business, and the third content as a consequence of his position in the case; while, on the other hand, the plaintiffs not only had corresponding advantages, but also that of the learning and industry of Smith and Mason, and of the prodigious intellectual power of the great triumvirate,—Smith, Mason and Webster,—who overtopped alike the whole court, and Holmes and Wirt, the opposing counsel.

We have seen (*ante*, p. 51,) that but six of the forty-three pages of Mason's argument in the state court, were devoted to the "single point" which could properly be mooted in the Supreme Court. Smith's great learning made him more diffuse and discursive. Webster's argument, etc., as carefully written out by him for Farrar, occupied forty-six pages, six pages were devoted to a statement of the case; ten to the question before the court, and thirty to the first and second points taken by Mason. In other words, at least three-fourths of his legal argument at Washington was upon points not before that court.

We give the admission of this fact and his reasons for

this extraordinary course in Mr. Webster's own words:

"It will be contended by the plaintiffs *that these acts are not valid and binding on them without their assent.* 1. Because they are against common right and the constitution of New Hampshire. 2. Because they are repugnant to the constitution of the United States.

"I am aware of the limits which bound the jurisdiction of the court in this case, and that on this record nothing can be decided but the single question, whether these acts are repugnant to the constitution of the United States. Yet it may assist in forming an opinion of their true nature and character, to compare them with these fundamental principles, introduced into the state governments for the purpose of limiting the exercise of the legislative power, and which the constitution of New Hampshire expresses with great fullness and accuracy.

"It is not too much to assert that the legislature of New Hampshire would not have been competent to pass the acts in question, and to make them binding on the plaintiffs without their assent, even if there had been, in the constitution of New Hampshire, or of the United States, no special restriction on their power; because these acts are not the exercise of a power properly legislative. Their object and effect is to take away from one, rights, property and franchises, and to grant them to another. This is not the exercise of a legislative power. To justify the taking away of vested rights, there must be a forfeiture; to adjudge upon and declare which is the proper province of the judiciary." Farrar's Report, p. 244.

If he was right—if vested rights can only be divested by the courts—and the rights in question had vested in the old trustees, he had no occasion to invoke the aid of the "obligation" clause. We have the authority of Mr. Webster for saying that aside from a single point and a few authorities cited in support of another, nothing as a legal argument was advanced by him at Washington which had not been urged by Smith and Mason in the state court. In his letter to Judge Smith of December 8, 1817, Webster says: "If I argue this

se at Washington, everyone knows I can only be the re-
r of the argument made by you at Exeter. You are,
efore, principally interested, as to the matter of reputa-
, in the figure I make at Washington. Nothing will be
ected of me but decent delivery of your matter. This
ns perfectly well understood this way, and I have been
uently complimented by gentlemen saying that, if the cause
s to Washington, they shall have a chance of hearing
omething of Judge Smith's argument.

I have some notion of going to Exeter for a day or two,
ractice and rehearse before I go to Washington. To be
ous, however, you and Mason must help me arrange the
ument. The best mode will be to have it written out, or
collected in notes, so that I can write it out." In his let-
to Judge Smith of January 9, 1818, he says :

I must beg the favor of all your notes. I have not as-
sance enough, although not entirely destitute, to think of
uing this cause on my own strength. To argue it as you
will be more than I shall ever be able to do. I wish to
sent the cause fully and fairly to the court, and your notes
enable me so to do. If anybody is coming over, pray
me have them soon, and all of them. If you have no
ortunity to send them direct, please forward them en-
ed, to Mr. Mason. I am writing to him to-day, and will
him to take care of the packet and send it to me di-
ly." All these "notes" and "minutes" were promptly
ished to Mr. Webster, and were returned by him to
son, March 22, 1818. In his letter of that date to Mason,
bster says: "I send you your brief and Judge Smith's;
may both probably need those hereafter."

n his letter to Judge Smith of March 14, 1818, two days
r the close of the argument, he says :

I opened the case with most of the principles and au-
rities on which we relied at Exeter. Your notes I found
contain the whole matter. They saved me great labor;
that was not the best part of their service ; they put me
he right path, and conduct, as I think, to an irresistible
clusion. On some parts of the case I have varied my

views a little. The rogues here in Congress complain that the cause was put on grounds not stated in the court below. There is little or nothing in this. I labored the point that it was a private corporation, a charity. Eleazer Wheelock, its founder, as such, entitled generally by law to be visitor; all the power of visitor assigned, in law, by him to the trustees, etc. The only new aspect of the argument was produced by going into cases to prove these ideas, which indeed lie at the very bottom of your argument."

In his letter of April 23, 1818, to Mason, Webster says: "As to the college cause, I cannot argue it any more, I believe. I have told you very often that you and Judge Smith argued it very greatly. If it was well argued at Washington, it is a proof that I was right, because all that I said at Washington was but those two arguments, clumsily put together by me. I do not mean to hold you answerable for any deficiencies; but in truth I have little right to claim the merit, if there be any, in the opening of our case." In his Sunday evening [1819] letter to Mason, he says: "There is one point on which I have suspected that my opinion differs from Judge Smith's; I think that the trustees are most clearly visitors, and that this lies at the bottom of our case, and as visitors, I think they are not answerable in any court, while acting within the scope of their visitorial power. I should be glad you would think of this a little. If I am in an error, it is a pretty important error."

I. History of the "Obligation" Clause.

"No state shall" * * "pass any" * * "law impairing the obligation of contracts."—*U. S. Const., Art. I, Sec. 10.*

This phrase is not the language of the common law. We did not derive it from the mother country. We find its source elsewhere. Nathan Dane, the author of *Dane's Abridgment*, and to whom the Harvard Law School is so much indebted, was a Massachusetts lawyer. He was born in 1752, and was admitted to the bar when thirty years old. He was a member of the Continental Congress in 1785-6-7. In 1786 it was found necessary to establish a form of government over the vast region then known as the "northwest territory."

task of drafting it was assigned to Dane, then thirty-years old. On July 13, 1787, the expiring Congress, the Convention for framing the present constitution being then in session,—though without “the least ‘color of’ constitutional authority,” adopted the ordinance without a single alteration. One of its provisions,—we use the italics the author,—was, “and in the just preservation of rights and property, it is understood and declared, that no law ought to be made, or to have force in said territory, that shall, in any manner whatever, interfere with, or *affect private contracts* or engagements, bona fide and without fraud, previously made.” That the prime purpose of this clause was to protect the legislatures of the expectant states from interfering with the enforcement of private executory contracts, is obvious; that the clause adopted by the Federal Convention was intended to restrict rather than to enlarge the scope of the clause in the ordinance, seems clear. That convention nominally met on May 14, 1787. It formally concluded its labors on September 17, 1787. From time to time the “obligations of the federal pact,” “the obligations of the confederation,” the difference between “moral obligation” and “political obligation,” “the obligation” of states and those of the United States, had been discussed by the leading minds in the convention, Judge Ellsworth, Judge Wilson, Mr. Gerry, Dr. Johnson. On August 27, 1787, when discussing the clause conferring jurisdiction on the Federal judiciary, in answer to the question of Gouverneur Morris, the able and adroit who did the work of the committee on style, and gave “finish” to the final draught of the constitution, “whether it extended to matters of fact as well as law, and to cases of common law as well as civil law,” Judge Wilson, who was more to the committee on detail, than Morris to that on style, said: “The committee, he believed, meant facts as well as law, and common as well as civil law. The jurisdiction of the Federal Court of Appeals had, he said, been so conferred.” On August 28, 1787, Judge Wilson and Mr. Sherman moved to insert after the words “coin money,” in article 12 of the new constitution as reported by the committee

on detail, of which Judge Wilson was a leading member, the words, "nor emit bills of credit nor make anything but gold and silver coin a tender in payment of debts." After a brief debate the amendment was adopted. Mr. King of Massachusetts then moved to add the clause in the ordinance of 1787 which we have quoted from Mr. Dane. The following debate ensued:

"Mr. Gouverneur Morris. This would be going too far. There are a thousand laws relating to bringing actions, limitations of actions, etc., which affect contracts. The judicial power of the United States will be a protection in cases within their jurisdiction; and within the state itself a majority must rule, whatever may be the mischief done among themselves.

Mr. Sherman. Why then prohibit bills of credit?

Mr. Wilson was in favor of Mr. King's motion.

Mr. Madison admitted that inconveniences might arise from such a prohibition; but thought, on the whole, it would be overbalanced by the utility of it. He conceived, however, that a negative on the state laws could alone secure the effect. Evasions might and would be devised by the ingenuity of the legislatures.

Col. Mason. This is carrying the restraint too far. Cases will happen that cannot be foreseen, where some kind of interference will be proper and essential. He mentioned the case of limiting the period for bringing actions on open account—that of bonds after a certain lapse of time—asking, whether it was proper to tie the hands of the states from making provision in such cases.

Mr. Wilson. The answer to these objections is, that retrospective *interferences* only are to be prohibited.

Mr. Madison. Is not that already done by the prohibition of *ex post facto* laws, which will oblige the judges to declare such interferences null and void?

Mr. Rutledge moved, instead of Mr. King's motion, to insert, 'nor pass bills of attainder, nor retrospective laws.'

On which motion seven states voted aye, and three no.

On August 29, 1787, "Mr. Dickinson mentioned to the

ouse that, on examining Blackstone's Commentaries, he found that the term '*ex post facto*' related to criminal cases only; that they would not consequently restrain the states from retrospective laws in civil cases; and that some further provision for this purpose would be requisite."

On Sept. 12, 1787, Dr. Johnson from the committee on the plan, etc., which consisted of Johnson, Hamilton, Gouverneur Morris, Madison and King, reported the constitution in a new draft. Sec. 1, art. 10, provided: "No state shall coin money, or emit bills of credit, or make anything but gold or silver coin a tender in payment of debts, or pass any bill of attainder, or *ex post facto* laws, or laws altering or impairing the obligation of contracts; or grant letters of marque and reprisal, or enter into any treaty, alliance or confederation, or grant any title of nobility."

On Sept. 14, 1787, "Col. Mason moved to strike out from the clause 'no bill of attainder, nor any *ex post facto* law, shall be passed,' the words 'nor any *ex post facto* law.' He thought it not sufficiently clear that the prohibition meant by this phrase was limited to cases of a criminal nature; and no legislature ever did or can altogether avoid them in civil cases. "Mr. Gerry seconded the motion; but with a view to extend the prohibition to 'civil cases,' which he thought ought to be done."

"On the question, all the states were, no."

Later in the same day, but on whose motion does not appear, the order of the clauses in sec. 10 of art 1, which we have quoted, was changed (the word "altering" being exchanged from the "obligation" clause,) so as to read, "no state * * * shall pass * * * any * * * law impairing the obligation of contracts," etc.

"Mr. Gerry entered into observations inculcating the importance of public faith, and the propriety of the restraint put on the states from impairing the obligation of contracts; alleging that Congress ought to be laid under the like prohibitions. He made a motion to that effect. He was not seconded."

The peculiar phraseology of the "obligation" clause has.

for many years been ascribed to Judge Wilson. We are not aware that he ever made any public claim to it ; but it has his distinctive "ear-marks." That he moulded the phrase is hardly an open question, though it undoubtedly passed under the eye of Madison and Gouverneur Morris. Madison, manifestly referring to the evils which sec. 10, art. 1, was intended to prevent, said : "In the internal administration of the states, a violation of contracts had become familiar, in the form of depreciated paper made a legal tender, of property substituted for money, of instalment laws, and of the occlusions of the courts of justice, although evident that all such interferences affected the rights of other states, relatively creditors, as well as citizens creditors, within the state." That Mr. Madison here referred to executory contracts is too obvious for comment. The great knowledge of Mr. Madison, his experience, diplomatic tact and judicial temper, made him the central figure in that Amphictyonic council of great men ; though he lacked the slow but powerful intellect of Ellsworth, the great legal learning of Luther Martin, and the commanding genius of Hamilton.

Judge Wilson was a Scotchman. He was educated at Edinburgh and Glasgow. When about twenty-five years old, he emigrated to Philadelphia, and afterwards lived in the states of Pennsylvania and Maryland. He soon became a legal celebrity. For six out of the twelve years of its existence, he was a member of the Continental Congress. He was a man of superior abilities and possessed great learning

He was not only a master of the civil law, but of the French and Scotch law, which had the civil law for its basis, and of the common law as well. He was in favor of a strong central government, as was his colleague, Gouverneur Morris, and Hamilton ; but they differed very much in their views. Hamilton regarded the British government as the proper model, but Judge Wilson did not ; he proposed to build anew from the foundation, while preserving the autonomy of the states.

In his lectures to the law school upon "the general prin-

les of law and obligation," etc., prepared within a year after the Federal constitution went into operation, he criticises Blackstone's definition of municipal law and its "obligation," with a severity scarcely equalled by Austin and his admirers, at a later day, upon other points. With Wilson all forms of government and all laws were "contracts." He says: "We hold that an act which, considered indistinctly and dignified with the name of law, requires the whole supreme power of a nation to give it birth, is, when viewed more closely and analyzed into the component parts of its authority, properly ranged under the class of contracts. It is a contract to which there are three parties; those who constitute one of the three parties, not acting even in public characters." "The plain and simple analysis which I have given of the nature and obligation of acts of Parliament, is evidently countenanced by the expressive legal language of my Lord Hale. It is supported and confirmed by the very respectable authority of Lord Hardwicke. 'The binding force'—I use his very words as they are reported—'the binding force of these acts of Parliament arises from,'" etc. "Sir William Blackstone tells us that the original of the obligation which a compact carries with it is different from that of a law. The original of the obligation of a compact we know to be consent: the original of an act of Parliament we have traced minutely to the very same source." "In the eye of the common law, marriage appears in no other light than that of a civil contract; and to this contract the agreement of the parties, the essence of every rational contract, is indispensably required." Before the adoption of the constitution, Wilson had urged in case of "a law, by which an estate is vested or continued in an individual"—that the right is vested, and assigns as a reason therefor, that, "if, in this case, the legislature may at discretion, and without any reason assigned, arrest or destroy his estate, then a person seized of an estate fee simple, under legislative sanction, is, in truth, nothing more than a solemn tenant at will." In his lectures he says of the common law: "It prescribes the manner and *the obligation of contracts*; it establishes the rules by which contracts,

wills, deeds, and even acts of Parliament are interpreted." The italics are ours. Unless the contrary clearly appeared in the context, it would be a great stretch of imagination to say that the author, by the phrase "obligation of contracts," meant the irrevocable effect of deeds or estates in fee simple, vested by grant. The sharp contrast between these terms is enhanced, (taking into consideration his familiarity with Justinian and Domat,) by his assertion that, "The common law, as it respects contracts and personal property, discovers evident traces of the Roman jurisprudence." * * * * "I suggest, merely for consideration at present, a conjecture that many of those parts were incorporated into the common law during the long period of near four centuries, when the Roman jurisprudence predominated in England." Under the Institutes of Justinian, "The person to whom the right belonged, and the person against whom it existed, were said in Roman law to be bound by an obligation, the notion of an obligation being that of a tie between two parties of such a nature as to confer on the one a power of compelling by action the other to give, do, or make good something. The obligation did not give any interest in a thing, to get which might be the ultimate object of the proceeding, but only gave a means of acquiring it, or, under the Prætorian system, its value." "An obligation is a tie of law which binds us according to the rules of our civil law to render something." "They arise *ex contractu* or *quasi ex contractu*, *ex maleficio* or *quasi ex maleficio*."

Wilson defines a state as "an artificial person: it has its affairs and its interests; it has its rules; it has its obligations; and it has its rights. It may acquire property, distinct from that of its members; it may incur debts, to be discharged out of the public stock, not out of the private fortunes, of individuals; it may be bound by contracts, and for damages arising *quasi ex contractu*." "Smaller societies may be formed within a state by a part of its members. These societies also are deemed to be moral persons, but not in a state of natural liberty; their actions are cognizable by the superior power of the state, and are regulated by its laws.

these societies the name of corporation is generally appropriated," etc. He endorsed the common law doctrine that "the King and the Parliament are corporations."

In his lecture upon corporations he says: "It must be admitted, however, that, in too many instances, those bodies politic have, in their progress, counteracted the design of their original formation. Monopoly, superstition and ignorance, have been the unnatural offspring of literary, religious, and commercial corporations. This is not mentioned with a view to insinuate that such establishments ought to be preserved or destroyed: I mean only to intimate that they should be erected with caution, and inspected with care." And Judge Wilson drawn his inspiration from the French jurists, it would have been with the same result.

Pothier commenced his great work when Wilson was six years old, and died in 1772. He says: "The term obligation has two significations. In its most extensive signification, *lato sensu*, it is synonymous with the term *duty*, and comprehends *imperfect*, as well as *perfect*, obligations."

The term *obligation*, in a sense more proper and less extensive, comprehends only perfect obligations, which are called also *personal engagements*, giving to him with whom they are contracted the right of requiring the performance of them; and it is of this kind of obligation that we mean to speak in this treatise." The frequent use of this term by Judge Wilson, in both senses, shows how thoroughly he understood its meaning, in the convention of Virginia of which he was a member, which ratified the Federal constitution.

Judge Marshall, upon grave consideration, informed the people of Virginia that, though a state might sue upon a contract, it could not be sued; in other words, that, notwithstanding the state suability clause, the "obligation of contracts," in a constitutional sense, was a stick with but one end. But in *Chisholm v. Georgia*, decided in 1793, which was aumpsit against a state for the recovery of money, Judge Wilson, after re-asserting, in substance, the definition of a state quoted by us from his lectures, held otherwise, saying: "A

state, like a merchant, makes a contract; a dishonest state, like a dishonest merchant, wilfully refuses to discharge it; the latter is amenable to a court of justice. Upon general principles of right, shall the former, when summoned to answer the fair demands of its creditor, be permitted, Proteus-like, to assume a new appearance, and to insult him and justice by declaring, 'I am a sovereign state?' Surely not." In 1790, the law professorship was established in the College of Philadelphia, and Judge Wilson was made the first professor. In April, 1792, the legislature fused that college and the University of Pennsylvania. Able, sensitive, and tenacious as he was, if that act had violated the constitution which he was sworn to support, he certainly would have discovered it, and the world would have known the fact.

When *Trustees v. College* was decided, no member of the Federal Convention remained upon the bench, nor anyone specially familiar with its history. Neither its journal nor the Madison Papers had been published.

It is apparent that the court regarded these as common words, and gave them the popular interpretation, when they might as well have construed the preceding words, "*bill of attainder*," "*ex post facto*," etc., as popular terms.

In *Sturges v. Crowninshield*, (4 Wheat. 197,) which was under consideration at the same time with the college causes, Judge Marshall said: "In discussing the question whether a state is prohibited from passing such a law as this, our first enquiry is into the meaning of *words in common use*. What is the obligation of a contract? and what will impair it?

"It would seem difficult to substitute words which are more intelligible, or less liable to misconception, than those which are to be explained."

* * * * *

"The words of the constitution, then, are express, and *incapable of being misunderstood*." The italics are ours.

II. *The Causes, the Counsel, and the Argument at Washington.*

We have seen that *Trustees v. Woodward* was argued March 10, 11, and 12, 1818, by Webster, and Joseph (not Francis) Hopkinson, of Philadelphia, for the old trustees, and

by Holmes and Wirt, of Virginia, for the state. Webster made the opening argument for the plaintiffs, and Holmes for the defendant. Webster *was* the leading counsel on one side, and Holmes *assumed* to be on the other. Holmes pitted himself against Webster, and Hopkinson was pitted against Wirt. Webster spoke nearly five, and Holmes over three, hours. In his letter to Mason of March 13, 1818, Webster says: "The cause was opened on our side by me. Mr. Holmes followed. * * * * * Wirt followed." In his letter of March 14, 1818, to Judge Smith, he says: "My talk occupied nearly a whole sitting. Holmes followed. He spoke three or four hours."

John Holmes was a famous kaleidoscopic politician, and a power in the land in his day. "Alas, poor Yorick!" He was forty-five years old when he attempted to reply to Webster. He was born in Massachusetts in 1773, graduated at Brown University in 1796, with Tristram Burgess, Dr. Shurtleff, and other celebrities. He came to the bar in 1799, and in September of that year went into practice at Alfred, in the town of Sanford, in the county of York, in that part of Massachusetts then known as the District, and now as the state of Maine, and which was admitted into the Union two years after the argument in this case.

Massachusetts proper, with an area of some 7,800 square miles, was separated from the District of Maine, which comprised some 32,000 square miles—or about one-half the area of all the New England states—by the southeasterly point of New Hampshire. The York Congressional district—often termed Cyrus King's district—bounded on the west by New Hampshire, was represented from 1813 to 1817 by Cyrus King, a Federalist lawyer of note. Holmes took to politics as naturally as ducks to water. He was then a rank Federalist, representing that party in the Massachusetts legislature in 1802-3, and lampooned his opponents with great virulence.

The Federalists had a strong majority in Massachusetts proper, but Holmes' own town, county, and the District of Maine being the other way, late in 1811 he suddenly went

over to the enemy, and because a red-hot advocate of the national government and its war measures, and was elected to the House and Senate by his new friends, and served during the war. In 1815, he was appointed commissioner by Madison, under article 4 of the Treaty of Ghent. He was one of the leading advocates of the separation of Maine from the old commonwealth, which eventually became a party question. In June, 1816, the legislature of Massachusetts submitted the question of separation to the people, with the proviso that, if upon the vote of September, 1816, "it shall appear that a majority of five to four at least of the votes so returned are in favor of separation, the convention is to proceed in forming a constitution, and not otherwise." The convention was defeated; but Holmes, as chairman of the committee to examine the vote, etc., reported that it was carried, and that the convention should proceed in forming a constitution, which they did. This result was reached by an ingenious system of political arithmetic, which would have put to the blush the quota mathematics of that astute and fertile genius, Provost-Marshal General Fry. To get their basis, the committee first rejected 173 majority against separation, upon the ground of alleged technical informalities, and then reported that 22,316 votes were cast; that there were 11,969 yeas and 10,347 nays; that the whole aggregate majorities of yeas in towns and plantations were 6,031, and the whole aggregate majorities of nays 4,409; that on this construction of the act there was a majority of five to four, at least, in favor of said District's becoming an independent state. The legislature of Massachusetts overruled this construction, and disregarded the constitution adopted by the Brunswick convention; but the convention was carried, and a constitution was adopted in 1819. Holmes was the chairman of the committee that framed this constitution. He was elected to Congress from Cyrus King's district, (King died in April, 1817,) in 1816, was re-elected, and was in the United States Senate from 1820 to 1833.

Holmes was not without talent, such as it was. He had unbounded confidence in himself, and was always cool and

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perfectly self-possessed ; he was a scheming, busy, restless, rollicking politician ; his broad wit, sluice-word declamation and stinging repartee, with which he more than once silenced John Randolph and others scarcely less noted, were the delight of the crowds which gathered at the hustings ; at county courts ; and his questionable stories kept every country bar-room in a roar. But he was as much out of place before Judge Marshall's court, and pitted against such men as Webster, as it was possible to be. Caring for himself, climbing like a busy "sweep" with devious steps up the dirty chimney of political preferment, he had neither taste, time, inclination, nor the mental qualities, required to grasp, prepare, and argue a cause like this. The noisy eulogist ; the reputed protégé of Jefferson, he represented in politics, and statesmanship everything that the soul of Marshall loathed.

Webster never made the mistake of many so-called great men—he never underrated the power of an opponent. In nature he was singularly impersonal. When he attempted to give credit, he never erred except upon the side of generosity. In his letter of March 13, 1818, to Mason, he said "Mr. Holmes followed. * * * Upon the whole, he gave us three hours of the merest stuff that was ever uttered in a county court. Judge Bell [one of the judges who had decided this cause in the state court, and for whom Webster was counsel in *Bullard v. Bell*, then pending before the Federal Supreme Court,] was present, and had the pleasure of hearing him, but could not stay out his speech." In his letter to Judge Smith written the next day, Webster said "Holmes did not make a figure. I had a malicious joy in seeing Bell [the New Hampshire judge,] sit by to hear him while everybody was grinning at the folly he uttered. I could not stand it. He seized his hat and went off." Judge Daggett, a member of the United States Senate from Connecticut, then fifty-four years of age, one of the foremost lawyers of his day, afterwards chief justice of the supreme court of that state, and one of the greatest jurists that ever held that position, in his letter of March 18, 1818, to Mas-

says: "Tom Paine, speaking, or rather writing of some one, says: 'He went up like a rocket, and came down like a stick.' That is evidently true of a certain great man from Cyrus King's district. He has attempted as a politician so much wisdom, and such a desire to be admired by *everybody*, that he has ceased for weeks to be regarded by *anybody*. His friends, however, still uphold him as a lawyer, but in the Dartmouth College Cause, he sunk lower at the bar than he had in the hall of legislature. The opinion was entirely universal that Webster rose superior even to Wirt, (though it is said that *he* appeared very well,) and infinitely so to Holmes."

Hopkinson, in his letter to Webster of Nov. 17, 1818, says, referring to a conversation with Pinkney about this cause: "He says, 'Mr. Wirt was not strong enough for it, had not back enough.' There is a wonderful degree of harmony among our opponents in this case. You may remember how Wirt and Holmes thought and spoke of each other." It hardly needed this letter to show the light in which Wirt regarded Holmes. If further comment were necessary upon a performance that could drive a grave and patient judge like Bell out of the court-room in disgust, it might be found in some of the legal positions taken by Holmes.

Wirt was a different man. He was a year the senior of Holmes, possessed an ardent social nature, a vivid imagination, had genius and culture, was an able lawyer and a brilliant advocate of the red-baize school which went out of vogue after the advent of Webster; but he was placed second to Holmes, and could not fail to appreciate the fact; was crowded with business, unfamiliar with the local law and the history and details of the case, inadequately prepared, and had great aversion to New England men and matters. He had a large practice, was nominated for attorney-general of the United States on November 13, 1817, and was confirmed on December 15, 1817. He purchased an establishment at Washington, removed there and assumed the duties of his office in January, 1818, and was pushed for weeks to the very verge of endurance in attempting to give proper attention to his practice, and trying to bring order out of the chaos which he found in his new office.

In his letter to Judge Carr of January 21, 1818, he says it is late at night—the fag-end of a hard day's work. My eyes, hand and mind all tired." * * * * "The office is no *sinecure*. I have been up till midnight, at work every night, and still have my hands full." * * * * "The Supreme Court is approaching. It will half kill you to hear that it will find me unprepared; but I shall contrive ways and means to keep my professional head, at least, above water. As to any great figure, I cannot promise it, in the struggle in which I am now engaged."

Webster, in his letter to Mason of March 13, 1818, says Wirt followed. He is a good deal of a lawyer, and has very quick perceptions and handsome power of argument, but he *seemed to treat this case as if his side could furnish nothing but declamation.*" * * * * "He undertook to make one legal point on which he rested his argument, namely, that *Dr. Wheelock was not the founder.* In this he was, I thought, completely unsuccessful. He abandoned his first point, recited the foolish opinions of Virginians on the third." * * *

He made an apology for himself, that he had not had time to study the case, and had hardly thought of it till it was called on. In his letter of March 14, 1818, to Judge Smith, Webster says: "Wirt has talents, is a competent lawyer, and argues his good cause well. *In this case he said more nonsensical things than became him.*" The italics are ours.

No man could make a good legal argument in such a cause who "had hardly thought of it." Wirt was as guileless as a child when he made this statement; he simply told the truth. The history of the incident referred to by Webster shows this. Wirt was arguing that Wheelock was not the "founder of the college." Webster had his attention called to the clause in the charter reciting that Wheelock was the "founder," etc. Wirt had no knowledge that such a clause was in the charter, and knowing nothing of the history of Moor's Charity School, he was "dumbfounded," and, as Webster says, "abandoned" the point." Such a circumstance could not fail to leave its impression on the minds of the court, and to it we undoubtedly owe much of the language of the opinions.

Unable from his situation to give the judges anything new in the way of an argument, he gave them a most brilliant and vehement declamation, arrayed in all the gorgeous colors of the rainbow. Wirt commenced his speech in the afternoon of March 11, 1818. Whether in consequence of Webster's disabling him in the tilt about the "founder," etc., or his vehemence, or what is more probable, from both, does not distinctly appear; but cotemporary accounts show that he utterly broke down, lost the control of his voice, had to apologise to the court for his inability to go on, and asked their indulgence till the next day, when he concluded. All knew that Wirt was a favorite at Monticello, that he was the right hand of Jefferson in Burr's trial, and had been his private counsel for years.

Hopkinson replied to him on March 12, 1818. He was forty-eight years of age, and an eminent lawyer. He was admitted to the bar in 1791, and was a member of Congress at the time of the argument. Webster, in his letter to President Brown of March 13, 1818, says: "Mr. Hopkinson understood every part of the cause, and in his argument did it great justice. No new view was suggested on the other side;" In his letter the same day to Mason, Webster says: "Mr. Hopkinson made a most satisfactory reply, keeping to the law, and not following Holmes and Wirt into the fields of declamation and fine speaking." In his letter of March 14, 1818, to Judge Smith, Webster says: "Hopkinson in concluding confined himself strictly to replying, and acquitted himself with ability." The most adverse critics conceded that Mr. Hopkinson argued the cause "handsomely."

And Webster, what can we say of him! In his simple and unaffected intellectual greatness, he towered as much above the mass of mankind as Mount Hood above the smiling valley of the Willamette, the foot-hills, and the snowy peaks which encircle it. He was one of those great men who are, as it were, the land-marks of ages; he was endowed with a majestic presence; those great, deep, black eyes, with their intense coal-fire glow, which had come down to him on the stream of generations from Stephen Bachiler, seemed as if

ly searched alike the seen and the unseen world ; his wonderful voice which has thrilled the very marrow in our bones when the end of the mighty old man was nigh, was the attribute of one born to convince and conquer.—All these were counter-weights enough to be thrown into the scale on one side if others were added.

We have seen that Mason's argument occupied forty-three pages and Webster's forty-six pages in Farrar's Report. Both were able speakers, and uttered about the same number of words in a given time. Mason spoke two hours, and Webster, in Washington, nearly five. Webster's memory was such that he could have written out his argument nearly verbatim had he chosen. Something must be allowed for the peroration and for something, perhaps, for condensation, though Webster generally condensed his speeches by the preparation and rehearsal he gave them before their delivery. Making all due allowance, more than an hour was devoted to *something* which, Mr. Webster informs us, was "left out." What was it? No report of it exists. We only know its drift.

In his most eloquent but cultured phrase he pressed the whole political aspect of the case upon the attention of the court. He contended with warmth and severity upon the course of the Federal Government, and the revolution which the "Jacobins" had wrought in its policy for political purposes ; asserted that the legislature which was the creature of this "Jacobin" irruption, had trampled the sacred rights of property, by the passage of the laws, in direct violation of the state constitution and the fundamental principles of our government, had overturned the judiciary of the state and created a new one to subserve its purposes ; and declared there was no protection unless afforded by the Federal tribunals. We now see the real reason why thirty pages—three-fourths of his entire legal argument in Farrar's Report were devoted to points not before the court.

In his letter to Judge Smith of March 14, 1818, Webster says : "We finished with the third day. The next morning, yesterday, the chief justice told us the court had conferred and there were different opinions, and that some judges had

not formed opinions; consequently the cause must be continued."

Another account is as follows: "On Friday morning [March 13, 1818,] the chief justice observed that the judges had conferred on the cause between the Trustees of Dartmouth College and William H. Woodward. Some of the judges have not come to an opinion on the case. Those of the judges who have formed opinions do not agree. The cause must therefore be continued until the next term."

In the letter of Webster just quoted he says: "I have no accurate knowledge of the manner in which the judges are divided. The chief and Washington, I have no doubt, are with us. Duvall and Todd perhaps against us; *the other three holding up*. I cannot much doubt but that Story will be with us *in the end*, and I think we have much more than an even chance for one of the others." The italics are ours. The guarded language of Webster, the allusion to Judges Johnson and Livingston, and the implication in the peculiar reference to Judge Story, must be read in the light of tradition and history, to be fully appreciated. It has long been an open secret with a few that Story's first opinion was adverse to the old trustees. This gradually cropped out in lectures, addresses, and the like, and in some of the legal journals of our day. We have seen that the essential facts of the case were as well understood by the leading minds in New England two years before, as two years after, the decision; and so of the general grounds taken by both sides. The question was an interesting and important one, constantly mooted in all legal, religious and political circles. The tradition is that Judge Story carefully examined the case, with his characteristic zeal and indefatigable research, and arrived at the same result reached by his friend Chief Justice Richardson; that he communicated this fact semi-confidentially to his friend Ichabod Bartlett, one of the counsel for the state, from whom in an impalpable form, in the same way, it dripped into the narrow circle of Wheelock and his special friends,—or, as Webster termed them, the "university people." The authorities for this are Bartlett, Webster and Choate. Webster, referring

his fact and the final decision, as the anecdote is related Mr. Choate, said to him: "Bartlett and the university people were dumbfounded, thunderstruck, when they found Story had gone against them." It is no discredit to try that he changed his opinion, but the contrary, for it is first and last, the highest and holiest duty of every judge to be right; but it should have made him more charitable to him sometimes seemed toward those who felt that his first opinion was the soundest.

What Mr. Webster says of *Bullard v. Bell*, etc., is an illusion of the accuracy of his knowledge of the inner workings of the Supreme Court, and the position of its individual judges. In his letter to Mason of February 15, 1819, he says: "In Mr. Bell's case, Mr. Pinkney was near two hours opening, and full four in the close. In that case we have judgment yet. I think some impression was made on the side, and I have hopes of the issue, but know nothing certain." In his letter to Mason of February 23, 1819, he says: "In Judge Bell's case, the event is exceedingly doubtful. My belief is, there is a division on the bench. You take it for true, at present, that Ch. J., L. and J. [Marshall, Livingston and Johnson,] are in favor of Bell; W., D., S., [Washington, Duvall, and Story,] *contra*. It is not worth while to mention this, even to Mr. Bell. It is possible that further reflection may bring a majority to think alike, but I am fearful it must stand over and be argued again before Todd." In his letter to Mason of February 15, 1819, he says: "The question is before the court, whether the Bankrupt Laws [*Sturges v. Crowninshield*, 4 Wheat.] are valid. The general opinion is that the six judges here will be equally divided on the point. I confess, however, I have a strong suspicion there will be an opinion, that that opinion will be *against* the state laws." The result in these as well as other causes which might be named, shows that Webster knew whereof he spoke. Indeed, in those cases, judges were not so chary as respects what transpired in consultation as they have since been reputed to be.

Chief Justice, in his letter to Judge Carr of March 24, 1817, says:

"In relation to the fate of the Washington cause, it is not decided. The court thought the cause with me on the evidence, on which the argument turned; but being an admiralty case, they have, according to the practice of that court, indulged the opposite party with farther proof. So that it is possible we shall have another heat at it next winter. Judge Johnson, of the Supreme Court, told me here the other day that my client would certainly recover the cargo, (which is infinitely the most valuable part of the subject,) and as for the ship, if our adversary did not alter the cause most materially by his farther proof (which it was not believed he could do,) we should get that, too."

We have already seen that after the arguments were closed, and after he knew that the judges were divided in opinion, Webster insisted on pressing the other causes through the circuit court up to the Supreme Court. In his letter to Mr. Mason of March 22, 1818, Webster says: "I believe it is fully expected that a case raising the question in the amplest form will be presented at the circuit court. I have given some reason to expect this, and, unless for good causes, should be mortified if it were not so." In his letter to President Brown of March 30, 1818, he says: "I am glad an action is brought, and hope it will come on regularly at the May term." In his letter to Mason of April 28, 1818, from which we have already quoted, he says: "I saw Judge Story as I came along. He is evidently expecting a case which shall present all the questions. It is not of great consequence whether the actions or action go up at this term, except that it would give it an earlier standing on the docket next winter."

From the facts already shown may be gathered some of the reasons why the personal friends of Wheelock committed the fate of these causes to the great Federal lawyer, William Pinkney.

In his letter of November 9, 1818, to President Brown, Webster says: "I received yours yesterday. It will not be necessary to decide on the subject of other counsel until I see you. You do not appear to apprehend my reasons ex-

actly, and I can explain them better *ore tenus*; suffice it to say, at present, that, although if nothing should be necessary in the way of argument but a reply, Mr. Hopkinson or myself might do that, yet if it should be necessary to go over the whole ground again, some new hand must come into the cause. My own impression is to apply, in case of need, to some gentleman there on the spot. Let this rest till January." * * * * * "I am not certain that a new argument will be ordered, and am still more doubtful whether a new opening on our side will be called for. But this is possible, and if so, some gentleman must repeat our view, and add what he or we may have obtained new. This event or course of things is not probable, but possible." In Mr. Hopkinson's letter to Webster of November 17, 1818. he says: "On my arrival here [Washington] I received your letter of the 9th instant, just as I was about to write to you on the same subject. In my passage through Baltimore, I fell in with Pinkney, who told me he was engaged in the cause by the present university, and that he is desirous to argue it, if the court will let him." * * * * * "On receiving this information from Mr. Pinkney, I seriously reflected upon the course it would be proper for us to take; and I assure you most truly, I decided precisely in favor of that suggested by you. It cannot be expected we shall repeat our argument merely to enable Mr. Pinkney to make a speech, or that a cause shall be re-argued because, after the argument has been concluded, and the court has the case under advisement, either party may choose to employ new counsel. I think if the court consents to hear Mr. Pinkney, it will be a great stretch of complaisance, and that we should not give our consent to any such proceeding; but if Mr. Pinkney, on his own application, is permitted to speak, we should claim our right of reply. The court cannot want to have our argument repeated; and they will hardly require us to do it for the accommodation of Mr. Pinkney." Judge Story, in his letter to the reporter (Wheaton) of December 9, 1818, says: "The next term of the Supreme Court will probably be the most interesting ever

known. Several great constitutional questions, the constitutionality of the insolvent laws, of taxing the Bank of the United States, and of the Dartmouth College new charter, will probably be splendidly argued. Mr. Pinkney is engaged in these and in several other very important questions sent from my circuit."

In Webster's letter to Mason of February 4, 1819—two days after the decision—he says: "On the other side a second argument, as you know, was expected. Dr. Perkins had been a week at Baltimore conferring with Mr. Pinkney. Mr. Pinkney came up on Monday. On Tuesday morning, he being in court, as soon as the judges had taken their seats, the chief justice said that in vacation the judges had formed opinions in the college cause. He then immediately began reading his opinion, and, of course, nothing was said of a second argument."

Misfortunes never come singly. It never rains but it pours. As fate would have it, for nearly a year before the causes were sent back to the circuit court, Pinkney and Wirt had been on bad terms. Pinkney had no rival, as he regarded it, at the bar of the Supreme Court before Webster appeared in the college cause; and he spared no one who assumed to be a rival. Oil and water would mix as soon as they, for they agreed in but one thing, and that was in their estimate of Holmes. Early in 1818, difficulties arose between the two in a trial which took place in Baltimore. A hostile meeting was only prevented by great exertion. Judge Story, in his letter to Wheaton of December 9, 1818,—from which we have quoted,—says in relation to this matter: "I am quite persuaded, without having heard a word of the facts, that our friend Mr. Pinkney is wrong in the recent disagreement with Mr. Wirt. The latter is a most worthy, good-humored, spirited gentleman, of eminent talents and fine accomplishments. Mr. Pinkney should not undervalue him, nor seek to obtain a temporary glory by robbing him of a single laurel."
* * * * "I have the highest opinion of Mr. Pinkney, who is truly *princeps inter principes*. We must talk with him on this subject, and make him feel he has much to lose, and

nothing to gain, by the course he sometimes pursues. He need not fear entering into competition with any advocate. All acknowledge his talents and his learning." Such a state of things, to say the least, was not eminently favorable for a cordial co-operation between them. Pinkney was a great favorite with the judges, and no man stood higher with the court than he did; but it is evident they did not intend to starve him in these causes. If they had, they would not have overruled his motion for a re-argument by announcing the judgment with a single opinion when nobody expected it; they would have ordered a judgment *nunc pro tunc* against the dead, when it was apparent from the grounds upon which he rested the motion that the practical effect would be to drive him out of court in the other causes. The reason for this course is probably to be found in Story's letter to Mason of October 6, 1819,—in which he says: "I am exceedingly pleased with your argument in the Dartmouth College case. I always had a desire that the question should be put upon the broad basis you have stated; and it was matter of regret that we were so stinted in jurisdiction in the Supreme Court, that half the argument could not be met and enforced. You need not fear a comparison of your argument with any in our annals,"—and in his opinion in *Charles River Bridge v. Warren Bridge*, 11 Pet. 584-644, which undoubtedly represented correctly upon these points, the views of the majority of the judges who sat in the college case. See also Webster's letter to Mason of April 19, 1813, *post*.

We do not know what Pinkney might have done had these causes been seasonably committed to his keeping. We do know that, notwithstanding his foibles, he was a great man,—an accomplished diplomatist, a great statesman, a consummate orator and profound jurist; and one of the purest patriots that ever breathed. He was a decided Federalist, but that never discolored his judgment of men, measures or parties; or obscured his sense of duty to his country. He was about fifty-four years old when he attempted to re-argue this case. He came to the bar when twenty-two, and was sent to the convention which ratified the Federal constitution when

twenty-eight. He ran the gauntlet of the state offices, in the House, Senate, and Council, and in 1796, Washington sent him to London as commissioner under the Jay treaty, where he remained for nearly eight years. In 1804 Maryland made him her attorney-general; from 1806 to 1811, he was minister to England, when Madison appointed him attorney-general of the United States, which office he resigned in about two years; in 1815 he was a member of Congress; from 1816 to 1818, he was minister to Russia and special minister to Naples; in 1819, he was elected to the United States Senate; and died on February 22, 1822, from over-exertion in his profession. Even Wirt, habitually generous to others, but never just to Pinkney, said, in his letter to Gilmer of May 9, 1822: "Poor Pinkney! He died opportunely for his fame. It could not have risen higher." * * * * *

"He was a great man. On a set occasion, the greatest, I think, at our bar. I never heard Emmett nor Wells, and, therefore, do not say the American bar. He was an excellent lawyer; had very great force of mind, great compass, nice discrimination, strong and accurate judgment; and for copiousness and beauty of diction, was unrivalled. He is a real loss to the bar. No man dared to grapple with him without the most perfect preparation, and the full possession of all his strength. Thus he kept the bar on the alert, and every horse with his traces tight." Judge Story, in his letter to Mr. White of March 3, 1819, says: "Mr. Pinkney rose on Monday to conclude the argument; he spoke all that day and yesterday, and will probably conclude to-day. I never, in my whole life, heard a greater speech; it was worth a journey from Salem to hear it; his elocution was excessively vehement, but his eloquence was overwhelming. His language, his style, his figures, his arguments, were most brilliant and sparkling. He spoke like a great statesman and patriot, and a sound constitutional lawyer. All the cobwebs of sophistry and metaphysics about state rights and state sovereignty he brushed away with a mighty besom." * * *

"I fear that this speech will never be before the public, but if it should be, it will attract universal admiration. Mr.

nkney possesses, beyond any man I ever saw, the power of elegant and illustrative amplification."

III. *The Judges and their Opinions.*

The judges who sat in *Trustees v. Woodward* were John Marshall and Bushrod Washington of Virginia, William Johnson of South Carolina, Brockholst Livingston of New York, Thomas Todd of Kentucky, Gabriel Duvall of Maryland, and Joseph Story of Massachusetts.

Webster, in his letter of February 2, 1819, to his brother, written in court, after the reading of Marshall's opinion, says: "All is safe. Judgment was rendered this morning reversing the judgment in New Hampshire. Present: Marshall, Washington, Livingston, Johnson, Duvall and Story. All concurring but Duval; and he giving no reason to the contrary. The opinion was delivered by the chief justice. It was very able and very elaborate: it goes the whole length, and leaves not an inch of ground for the University to stand on." In his letter, written in the court room, at the same time, to his associate and former partner, Judge Farrar, (the compiler of Farrar's Report,) he says: "A judgt. has been pronounced in our favor this morning; five judges out of the six judges present concurring. I believe Judge Duvall is the dissentient. The opinion was pronounced by the chief justice. It was very long, and reasoned out from step to step. It did not cite cases. I understand an opinion has also been drawn by Judge Story, which will probably be given to the reporter." In his letter written the same day to Judge Smith, he says: "I have the pleasure to tell you that the college cause has been decided in our favor. The chief justice, Washington, Livingston, Johnson and Story, Justices, *concurrentibus*; Duvall, Justice, *dissentiente*; *absente*, Todd. The opinion was delivered by the chief. I believe other judges also drew up opinions, which I hope to see published." In his letter written the same day to President Brown, he says: "All is safe and certain. The chief justice delivered an opinion this morning, in our favor, on all the points. In this opinion, Washington, Livingston, Johnson and Story, justices, are understood to have concurred. Duvall, Justice, it is said, dis-

sents. Mr. Justice Todd is not present. The opinion goes the whole length, and leaves nothing further to be decided. I give you my congratulations on this occasion, and assure you that I feel a load removed from my shoulders much heavier than they have been accustomed to bear." In his letter to Mason of February 4, 1819, from which we have already quoted, he says: "Since my arrival here I have been all the time in court, and can therefore as yet say nothing more than I have seen and heard here. Most of the judges came here with opinions drawn in the college cause." * * * * *

"Five of the judges concurred in the result, and I believe most or all of them will give their opinions to the reporter. Nothing has been said in court about the other causes. Mr. Pinkney *says* he means to argue one of them; but I think he will alter his mind. There is nothing left to argue on. The chief justice's opinion was in his own peculiar way. He reasoned along from step to step, and, not referring to the cases, adopted the principles of them, and worked the whole into a close, connected, and very able argument. Some of the other judges, I am told, have drawn opinions with more reference to authorities."

Mr. Hopkinson, in his letter to President Brown of February 2, 1819—following the line of that part of Mr. Webster's argument which was "left out" of the report—says: "Our triumph in the college cause has been complete. Five judges, only six attending, concur not only in a decision in our favor, but in placing it upon principles broad and deep, and *which secure corporations of this description from legislative despotism and party violence for the future.* The court goes *all lengths* with us, and whatever trouble these gentlemen may give us in future, in their great and pious zeal for the interests of learning, they cannot shake those principles which must and will restore Dartmouth College to its true and original owners." The italics are ours. The meaning of the words, "*all lengths*," is to be read in the light of Webster's letter to Mason of April 13, 1819, in which he says: "As to the college cause, you may depend on it that there will be difficulty in getting delay in that case, without reason. I

flatter myself the judge will tell the defendant, *that the new facts which they talk of, were presented to the minds of the judges at Washington*, and that, if all proved, they would not have the **least** effect on the opinion of any judge; that unless it **can be** proved that the king did not grant such a charter as the **special** verdict recites, or that the New Hampshire general **court** did not pass such acts as are therein contained, no **material** alteration of the case can be made." Webster here uttered not prophesy but fact.—The italics are ours.

[TO BE CONTINUED.]

III. REMOVAL OF SUITS FROM STATE COURTS TO FEDERAL COURTS.

SECTION 1. The Federal Judicial System. Its Growth and Importance.

SEC. 2. Principal Statutes on the subject. Acts of 1789, 1866, 1867, 1875 :
Rev. Stats. Sec. 639.

SEC. 3. Constitutional validity of Removal Acts.—Right Protected from
invasion by the States.

SEC. 4. Essential elements of the Statutory Right of Removal.

SEC. 5. Judiciary Act, Sec. 12 (Rev. Stats. Sec. 639, sub-division 1). Con-
ditions of Right of Removal thereunder.

SEC. 6. Act of July 27, 1866, (Rev. Stats. Sec. 639, sub-division 2). Na-
ture of Right thereby conferred.

SEC. 7. Act. March 2, 1867, (Rev. Stats. Sec. 639, sub-division 3). Na-
ture of right thereby conferred.

SEC. 8. Act March 3, 1875. Nature and Extent of Right thereby given.

SEC. 9. Nature of Suits that may be removed under above Acts. Prac-
tice. Repleader.

SEC. 10. From what Court removed. Removal; how enforced. *Certio-
rari*.

SEC. 11. Value or Amount in dispute, as a condition of Removability.

SEC. 12. Party entitled to Removal. Corporations. Aliens.

SEC. 13. Time when Application must be made.

SEC. 14. Mode of applying. Bond, etc. Affidavit of Local Influence,
under Act of 1867. Petition.

SEC. 15. Effect of Petition for Removal on Jurisdiction of State Court.

SEC. 16. Same on Federal Court.

SEC. 17. Remanding causes to State Court.

SECTION 1. *The Federal Judicial System—Its Growth and Importance.*—The Act of September 24, 1789, (1 Stats. at Large 79,) styled by way of eminence the Judiciary Act, was passed the same year in which the Constitution went into effect, and organized the National or Federal Judicial System, substantially as it exists to-day. No structural changes have since been made in that system, and considering the complex and highly artificial nature of the Federal jurisdiction, the Judiciary Act is justly to be regarded as one of the

most remarkable instances of wise, sagacious, thoroughly considered legislative enactments in the history of the law. It while the National Judicial System as established by that act remains without organic changes, yet changes of a minor yet important character have been made from time to time. This has been done, however, without disturbing the wise adjustments and skilful arrangements of the original plan. The system of 1789 is, in form and essence, the system of 1876. If we consider the intricate nature of the relations of the Federal and State governments; that each has a judicial system of its own; that the two classes of courts sit over the same territory, and exercise day by day jurisdiction over the same subjects and the same persons; that the judicial system provided by the Judiciary Act was untried and experimental; that serious conflicts between the State and Federal courts have been almost wholly avoided; that the Judiciary Act remains, after the lapse of nearly a century, almost intact,—it will appear that the admiration with which it has been regarded by statesmen, lawyers and judges, is not undeserved. And the changes which have been made are those which have been demanded by convenience, by the increase of the population and business of the country, and, arising and since the War of the Rebellion, by circumstances brought about by that unanticipated event, and they are not changes made necessary by want of foresight in the great minds which devised and enacted the original scheme. The altered condition of the country has made still further changes, or rather *enlargements*, of the plan necessary, such as, for example, an intermediate court of appeals, for the relief of the Supreme Court and the convenience of suitors; and more judicial force in the districts, etc.; but it is not the purpose of this paper to enter upon this topic.

The amendments to the Judiciary Act made from time to time by Congress concerning the Federal courts, and notably those made during and since the Rebellion, have tended uniformly in one direction, namely, an enlargement of their jurisdiction. And the recent act of March 3, 1875, in connection with the legislation then existing, has amplified the

Federal judicial power almost to the full limits of the constitution. The history of the Federal jurisdiction is one of constant growth, slow, indeed, during the first half-century and more, but very rapid within the last few years. For various reasons, which we need not stop to indicate, the small tide of litigation that formerly flowed in Federal channels has swollen into a mighty stream. Certain it is that of late years the importance of the Federal courts has rapidly increased, and that much, perhaps most, of the great litigations of the country are now conducted in them. This is noticeably so in the Western states. These observations have been made because they are a fitting introduction to the special topic we have placed at the head of this article,—*Removal of Causes from the State Courts*. They have, indeed, been suggested by that topic, for, as will be seen as we proceed, the limited right in this regard given by the Judiciary Act has been enlarged from time to time, until a very considerable portion of the contested cases in the Federal courts now reach them through this channel.

The editor of the REVIEW in consequence of the recent changes in the legislation on this important subject, and the uncertainty which many lawyers suppose to surround it in consequence of those changes, has requested the writer to prepare a practical article which shall exhibit the present state of the law concerning the *Right* to removal and the *Mode* of making that right available.

SEC. 2. *The Principal Statutes on the Subject of Removals. Acts of 1789, 1866, 1867 and 1875.* There are some statutes giving the right of removal in special cases which we shall only mention generally, such as the right to remove causes, civil and criminal, in any State court, against persons *denied Civil Rights*;¹ and suits, civil and criminal, against *Revenue Officers* of the United States, and against officers and other persons acting under the *Registration laws*;² and suits by *aliens* against *Civil Officers* of the United States under *speci-*

¹ U. S. Rev. Stats. secs. 641, 642.

² Rev. Stats. title XXVI "The Elective Franchise." Rev. Stats. sec. 643.

fied circumstances;³ and suits against certain *Federal Corporations* at their instance, upon verified petition, "stating that such defendant has a defence arising under or by virtue of the constitution or of any treaty or law of the United States."⁴

The important acts of general operation as to removals, and which relate to cases that daily arise, are, what is known as the 12th section of the Judiciary Act; the act of July 27, 1866,⁵ the act of March 2, 1867,⁶ known as the "prejudice or local influence act," and lastly the act of March 3, 1875.⁷ This last named act was passed since the Revised Statutes and consequently is not to be found therein. The 12th section of the Judiciary Act, the act of July 27, 1866, and of March 2, 1867, above mentioned, although technically repealed by the Revised Statutes of the United States are substantially re-enacted in the 639th section thereof. These statutes are the foundation of the law on the subject of removals on the grounds therein provided for, and the principal purpose of this article is to give a *reading* on those statutes, or, in other words, an exposition of their meaning in the light of the adjudications which have been made under them.

The text of these statutes is so essential to an understanding of the subject that we reproduce, for convenience, the more material portions of them in a note.⁸

³ Rev. Stats. sec. 644.

⁴ Rev. Stats. sec. 640. Construed, *Turton v. Union Pacific R. R. Co.* 3 Dillon, 366; see also *Fisk v. Same*, 8 Blatchf. 243; 6 Ib. 364.

⁵ 14 Stats. at Large, 306.

⁶ 14 Stats. at Large, 558.

⁷ Acts of 1875, p. 470.

⁸ Section 639 of the Revised Statutes is as follows: "Any suit commenced in any State court, wherein the amount in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, to be made to appear to the satisfaction of said court, may be removed for trial into the circuit court, for the the district where such suit is pending, next to be held after the filing of the petition for such removal hereinafter mentioned, in the cases and in the manner stated in this section.

"*First.* When the suit is against an alien or is by a citizen of the state wherein it is brought, and against a citizen of another state it may be removed on the petition of such defendant, filed in said state court at the time of entering his appearance in said state court." [This is substantially, section 12 of the Judiciary Act.]

SEC. 3. *Validity of the Removal Acts—Right protected from Invasion or Denial by the States.*—The power of Congress to authorize the transfer of cases to which the Federal judicial power conferred by the constitution extends, from the State courts to the Federal courts, has been frequently declared by the Supreme Court, and the constitutionality of the removal acts of 1789, 1866 and 1867, is established beyond question.

"*Second.* When the suit is against an alien and a citizen of the state wherein it is brought, or is by a citizen of such state against a citizen of the same, and a citizen of another state, it may be so removed, as against said alien or citizen of another state, upon the petition of such defendant, filed at any time before the trial or final hearing of the cause, if so far as it relates to him, it is brought for the purpose of restraining or enjoining him, or is a suit in which there can be a final determination of the controversy so far as concerns him, without the presence of the other defendants as parties in the cause. But such removal shall not take away or prejudice the right of the plaintiff to proceed at the same time with the suit in the state court as against the other defendants." [This is substantially the act of July 27, 1866.]

"*Third.* When a suit is between a citizen of the state in which it is brought, and a citizen of another state, it may be so removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit, if before or at the time of filing said petition, he makes and files in said state court an affidavit, stating that he has reason to believe and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court." [This is substantially the act of March 2, 1867].

Section 639 of the Revised Statutes continues as follows: "In order to such removal the petitioner in the cases aforesaid must, at the time of filing his petition therefor, offer in said state court good and sufficient surety for his entering in such circuit court, on the first day of its session, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in the cause, or, in said cases where a citizen of the state in which the suit is brought is a defendant, copies of all process, pleadings, depositions, testimony, and other proceedings in the cause concerning or affecting the petitioner, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein. It shall thereupon be the duty of the state court to accept the surety and to proceed no further in the cause against the petitioner, and any bail that may have been originally taken shall be discharged. When the said copies are entered as aforesaid in the circuit court, the cause shall there proceed in the same manner as if it had been brought there by original process, and the copies of pleadings shall

The validity of this legislation," says Mr. Justice Field, "is not open to serious question, and the provisions adopted have been recognized and followed, with scarcely an exception, by

have the same force and effect, in every respect and for every purpose, as the original pleadings would have had by the laws and practice of the courts of such state if the cause had remained in the state court."

Act of March 3, 1875. The second and third sections of this act in relation to the removal of actions is as follows: "§ 2. That any suit of civil nature, at law or in equity, now pending or hereafter brought in any state court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects, either party may remove said suit into the circuit court of the United States for the proper district; and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then, either one or more of the plaintiffs or defendants actually interested in such controversy, may remove said suit to the circuit court of the United States for the proper district."

"§ 3. *Removal. Proceedings.*—That whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suits mentioned in the next preceding section, shall desire to remove such suit from a state court to the circuit court of the United States, he or they may make or file a petition in such suit in such state court before or at the term at which said cause could be first tried and before the trial thereof, for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for there appearing and entering special bail in such suit, if special bail was originally requisite therein, shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit, and any bail that may have been originally taken shall be discharged; and the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court," &c., &c.

the Federal and State courts since the establishment of the government."⁹

In this connection, it may also be observed that the right to remove cases into the Federal court, when the terms upon which the right is given by the acts of Congress in that behalf are complied with, cannot be defeated by State legislation. Therefore, a State statute which allows an insurance company to do business in the state only on condition that it will agree not to remove suits against it to the Federal courts, is unconstitutional, and such an agreement, though entered into by the company, is void.¹⁰

SEC. 4. *Material Elements of the Right as given by the principal Statutes.*—The material elements of the statutes on this subject, it will be perceived, are the *nature of the suits* which may be removed; the *amount or value* in dispute; the *parties* to the suit, and in this connection the *party entitled* to the removal; the *time* when the application must be made; the *mode* of making the application, and herein of the *surety or bond*, etc., required, and the *effect on the jurisdiction* of the State court and of the Federal court of a proper application to remove a cause which is removable.

SEC. 5. *The 12th Section of the Judiciary Act.*—Before entering in detail upon the several elements of the removal enactments, it is advisable to advert to some general considerations touching these several statutes.

We commence with section 12 of the Judiciary Act. The reader may recur to its language as re-enacted in substance in the Revised Statutes, given in a note to a preceding section, and it is important to remember that from 1789 until the act of July 27, 1866, above mentioned, the 12th section of

⁹ *Gaines v. Fuentes*, U. S. Sup. Court, Oct. term, 1875, 3 Cent. Law Jour. 371. See, also, *Sewing Machine Companies' Case*, 18 Wall. 553; *Johnson v. Monell*, 1 Woolw. 394; *Chicago etc. Railway Co. v. Whitton's Admr.* 13 Wall. 270.

¹⁰ *Insurance Co. v. Morse*, 20 Wall. 445. See, also, *Insurance Co. v. Dunn*, 19 Wall. 214; *Gordon v. Longest*, 16 Pet. 97; *Kanouse v. Martin*, 14 How. 23, S. C. 15 How. 198; *Stevens v. Phoenix Insurance Co.* 41 N. Y. 149; *Holden v. Putnam Ins. Co.* 46 N. Y. 1; *Hadley v. Dunlap*, 10 Ohio St. 1. *Home Ins. Co. v. Davis*, 29 Mich. 238, is inconsistent with *Ins. Co. v. Morse*, *supra*.

Judiciary Act was the only statute authorizing the removal of causes from the State courts to the circuit court of the United States, on the ground of citizenship of the parties. Section 12 of the Judiciary Act, omitting the case of aliens, authorized the removal by the *defendant*, (under limitations herein mentioned,) where the suit is commenced in the State court "by a citizen of the state in which the suit is brought, against a citizen of another state." That is, if the suit is by a resident plaintiff, the *non-resident* defendant may have it removed; but the resident plaintiff could not. Under section 11 of the Judiciary Act as to *original* suits in the circuit court, a *non-resident* plaintiff might sue in the circuit court against a *resident defendant*; but if the non-resident plaintiff elected to sue in a State court, section 12 of that act gave *neither* party the right to remove the cause from the State court to a court of the United States. The plaintiff was not given the right to remove the cause because he had voluntarily selected the State court in which to bring his action; the defendant was not given the right to remove the cause because it was not supposed that *he* would have any grounds to object that he was sued in the courts of his own state. So that the right of removal by the 12th section of the Judiciary Act is limited to the non-resident citizen when sued by a resident plaintiff in the courts of the state. By section 11 of the Judiciary Act, the circuit court has jurisdiction when the suit is between a citizen of the state in which it is brought and a citizen of another state. This was construed by the courts to mean that if there were several plaintiffs and several defendants, *each one of each class* must possess the requisite character as to citizenship.¹¹ For example, a citizen of New York and a citizen of Georgia could not join as plaintiffs suing in New York a citizen of Massachusetts, if found in New York, because the plaintiffs were not each competent to sue; for the citizen of Georgia could not, under section 11 of the Judiciary Act, sue a citizen of Massachusetts in New York.¹² Some of the more important cases touching the juris-

¹¹ *Strawbridge v. Curtiss*, 3 Cranch, 267; *Coal Co. v. Blatchford*, 11 Ill. 172.

¹² *Moffat v. Soley*, 2 Paine, C. C. 100.

fiction of the circuit court under the 11th section of the Judiciary Act, and concerning the effect of the act of 1839, (5 Stats. at Large 321,) which relates to suits commenced in the circuit court are referred to in the note, as they have a bearing on the construction of the 12th section.¹³

But it should be borne in mind that in cases removed from the State courts the jurisdiction of the circuit court is dependent upon the act under which the suit is removed, and not upon the legislation which confers jurisdiction upon that

¹³ The case of the Commercial Bank v. Slocum, 14 Pet. 60, (except so far as it has been since overruled as to the suability of corporations in the Federal courts,) holds and only holds, that under the Judiciary Act the jurisdiction of the circuit court is defeated if some of the defendants are citizens of the *same state with the plaintiffs*; and that this principle was not changed by the act of February 28, 1839. Same principle affirmed, at the same term, in a case rightly decided. Irvine v. Lowry, 14 Pet. 293. See, also, Clearwater v. Meredith, 21 How. 489. In Taylor v. Cook, *et al.*, 2 McLean, 516, the plaintiffs were citizens of *New York*, and brought suit in the circuit court of the United States in *Illinois* against Cook, a citizen of *Illinois*, and Spaulding, a citizen of *Missouri*, who entered a voluntary appearance, and the question was, whether the court had jurisdiction, and, aided by the act of 1839, it was held that it had. Judge McLean, in delivering his opinion says, *arguendo*, that prior to the act of 1839, and under the 11th section of the Judiciary Act limiting the jurisdiction to suits between "a citizen of the state where the suit is brought and a citizen of another state," as construed, "the court could not take jurisdiction of the case; for as between the plaintiffs who are citizens of New York and the defendant, Spaulding, who is a citizen of Missouri, the court could exercise no jurisdiction in the state of Illinois; because in that case neither party would reside in the state where suit is brought." But see *contra*, the observations, *arguendo*, of Wayne, J., in Louisville Railroad Company v. Letson, 2 Howard, on pp. 553, 554, in which he concludes that it is not necessary under the Judiciary Act that all of the defendants should be citizens of the same state, provided none of them are citizens of the same state with the plaintiff. (See *infra*, sec. 8.) The joinder of a defendant not served, and who does not appear, who is a citizen of the *same state* with the plaintiff, does not defeat the jurisdiction of the circuit court; at all events, it does not since the act of 1839. Doremus v. Bennett, 4 McLean, 224. But the joinder of *such* a defendant who is served, if he be not a mere nominal defendant, does defeat the jurisdiction; at all events, it did prior to the act of March 3, 1875. Ketchum v. Farmers etc. Co. 4 McLean, 1; Coal Co. v. Blatchford, 11 Wall. 172; Sewing Machine Co. Case, 18 Wall. 553.

court in cases originally brought therein; and therefore the restrictions on the jurisdiction in the 11th section of the Judiciary Act have no application to cases removed under the 12th section of that act.¹⁴

Under section 12 of the Judiciary Act regulating removals, it is settled that a cause can not be removed thereunder unless *all* the defendants ask for it; that to bring the case within the act *all* the plaintiffs must be citizens of the state in which suit is brought, and *all* of the defendants must be *citizens* of some other *state* or *states*.¹⁵ But this rule, we may remark in passing, does not apply to persons who are mere nominal or formal parties.¹⁶

Omitting the case of aliens, it will be perceived that the 12th section of the Judiciary Act, (now Rev. Stat. Sec. 639, sub-division 1,) gave the power of removal only under the following circumstances: 1. The plaintiff, or if more than one, then all of the plaintiffs, must be citizens of the state in which the suit is brought.

2. The defendant, or if more than one, then *all* of the defendants must be citizens of another state or states:

3. It is limited to *civil* suits, involving, besides costs, a sum or value exceeding \$500.

¹⁴ *Green v. Custard*, 23 How. 484; *Sands v. Smith*, 1 Dillon, 293, 297; *Sayles v. N. W. Ins. Co.* 2 Curtis, C. C. 212; *Gaines v. Fuentes*, U. S. Sup. Court, Oct. term, 1875; 3 Cent. Law Jour. 371.

¹⁵ *Beardsley v. Torry*, 4 Wash. 286, (1822); *Ward v. Arrendondo*, 1 Paine, 410, (1825); *Hubbard v. R. R. Co.*, 3 Blatchf. 84, s. c. 25 Vt. 715, (1853); *Smith v. Rines*, 2 Sumn. 330.

¹⁶ *Brown v. Strode*, 5 Cranch, 303; *Wormley v. Wormley*, 8 Wheat. 421; *Ward v. Arrendondo*, *supra*; *Wood v. Davis*, 18 How. 467. Who are nominal parties and who are not, see *Bixby v. Couse*, 8 Blatchf. 73; *Coal Co. v. Blatchford*, 11 Wall. 172; *Davis v. Gray*, 16 Wall. 220; *Weed Sewing Machine Co. v. Wicks*, 3 Dillon, 261, 266; *Knapp v. Troy & Boston R. R. Co.*, Sup. Court, Oct. Term, 1873, 20 Wall. 117, where the cases are cited by Mr. Justice Davis. In this last case, the learned judge speaking of the removal act of 1867, says, "it does not change the settled rule that determines who are to be regarded as the plaintiff and the defendant; and as the plaintiff and defendant in this action were both citizens of New York, the circuit court had no jurisdiction to entertain it." 20 Wall. 124.

4. The right of removal is limited to the *defendant* or defendants, and must be exercised or applied for by all of the defendants.

5. The petition for the removal must be filed *at the time* the defendant or defendants *enter their appearance* in the State court. Hence, if some of the plaintiffs were not citizens of the state in which the suit was brought; or if some of the defendants were citizens of the same state with the plaintiff; or if the defendants answered or submitted to the jurisdiction of the State court before applying for the removal; or if all of the defendants (other than formal or nominal parties) did not apply for the transfer; or if the amount in dispute did not exceed \$500,—then, and in each of these cases, there could be no removal.¹⁷

SEC. 6. *Act of July 27, 1866.* The act of July 27, 1866, (now Rev. Stat. sec. 639, sub-division 2) is the first act which allowed *part* of the defendants to remove a cause; but this right is given by the act only under specified and limited circumstances. Omitting the case of aliens, which is of unfrequent occurrence and presents little that is peculiar, the following conditions must co-exist to authorize a removal under this act:

1. The suit in the State court must be by a plaintiff who is a citizen of the state in which the suit is brought.

2. It must be against a citizen of the same state *and* a citizen of *another* state as defendants.

3. The *amount* in dispute must exceed the sum or value of \$500, besides costs.

4. The removal must be applied for “before the trial or final hearing of the cause” in the State court.

These elements concurring, then the non-resident defendant (not the resident defendant,) may have the cause removed, (not wholly,) but only so far as relates to himself, provided also, it be a suit “brought for the purpose of restraining or enjoining him, or is a suit in which there can be a *final determination* of the controversy *so far as concerns him*, without

¹⁷ See *infra* secs. 8, 9, 13, 15, and cases cited.

the presence of the other defendants as parties in the cause." The express provision is that the suit as between the plaintiff (a citizen of the state,) and the other defendant (also a citizen of the same state with the plaintiff,) shall proceed in the state court notwithstanding such removal to the Federal court. As between the plaintiff and the non-resident defendant (a citizen of another state,) the cause proceeds in the Federal court. It must be admitted that this is a singular result. The plaintiff's single action is thus split into two—one of which remains in the State court to be adjudged by it; the other goes to the Federal court to be adjudged by it. This act, it will be perceived, has no reference to cases in which one of the defendants are citizens of another state, (that being then provided for by section 12 of the Judiciary Act,) nor any reference to the cases in which the plaintiffs are citizens of any other state than that in which the suit is brought. Its obvious purpose was to give a right of removal, in the cases and on the terms prescribed, to the non-resident citizen who was joined as a defendant with a resident citizen, when sued by a resident plaintiff.¹⁸ It may be inferred that Congress doubted the power under the constitution (art. 3, sec. 2,) to authorize the removal of the *whole* case, since part of the case provided for would be between citizens of the *same* state. We say this may be inferred since otherwise we can scarcely conceive why it is that Congress would divide one case into two, and embarrass the parties with the inconvenience and additional expense resulting therefrom. Speaking of this act Mr. Justice Clifford observes: "Considering the stringent conditions which are embodied therein, it is doubtful whether it will prove to be one of much practical value."¹⁹ The necessity for this act grew out of the narrow construction early placed on the Judiciary Act, the embarrassments arising from which had been so long felt, and have finally led to the act of March 3, 1875. The experience of the past should induce great caution in the courts

¹⁸ *Bixby v. Couze*, 8 Blatchf. 73; *Allen v. Ryerson*, 2 Dillon, 501; *Field v. Lowndale*, 1 Deady, 288.

¹⁹ *Case of Sewing Machine Companies*, 18 Wall. 583.

in applying to that act the rigid principles of the early adjudications on the subject of Federal jurisdiction.²⁰

“SEC. 7. *Act of March 2, 1867.*—“*Prejudice or Local Influence.*” We now come to the act of March 2, 1867.²¹ It professes to be an *amendment* to the act of July 27, 1866, last noticed, and it extends the right, in the cases provided for, as well to *plaintiffs* as to defendants, but confines it to such as are *non-residents* of the state in which the suit is brought, and makes the ground of removal, not alone the citizenship of the parties, but prejudice or local influence. The act provides, “That where a suit is now pending or may hereafter be brought in any State court in which there is a controversy between *a citizen of the state in which the suit is brought* and a citizen of another state, * * * such citizen of another state, whether he be plaintiff or defendant, if he will make and file in such State court an affidavit that he has reason to believe and does believe that from prejudice or local influence he will not be able to obtain justice in such State court,” may have the cause removed to the circuit court of the United States. It will be seen that, as to the plaintiff, this follows the language of section 11 of the Judiciary Act, and not of section 12 of that act; the plaintiff may or may not be a resident of the state where the suit is brought; and the right of removal is given to the non-resident party, be he the plaintiff or defendant. Speaking of this act, Mr. Justice Miller in *Johnson v. Monell*,²² says: “The only conditions necessary to the exercise of the right of removal under it, are,

1. That the controversy shall be between a citizen of the state in which the suit is brought and a citizen of another state.
2. That the matter in dispute shall exceed the sum of five hundred dollars, exclusive of costs.
3. That the party citizen of such other state shall file the required affidavit, stating, etc., the local prejudice.

²⁰ See *infra* secs. 9 and note, 12, 13.

²¹ 14 Stats. at Large, 558.

²² 1 Woolw. 390.

4. Giving the requisite surety for appearing in the Federal court." * * "Congress," says this able judge, "intended to give the right in every case where the four requisites we have mentioned exist." In the case just cited, the plaintiff was a citizen of Iowa, one defendant was a citizen of Nebraska, and the other of New York, but the last was not served with process and did not appear, and it was held that the plaintiff was entitled, under the act of March 2, 1867, to have the case transferred from the State court to the United States court, after a verdict of the jury in the State court in his favor had been set aside by the court. This act, let it be noted, only applies where one of the parties is a citizen of the state in which the suit is brought, and the adverse party is a citizen of another state—in this respect conforming to the previous legislation on the subject.²³ This act undoubtedly grew out of the condition of affairs in the Southern States after the War of the Rebellion, and was intended to afford to plaintiffs who had resorted to the State court the

²³ In the leading case on this statute, entitled in the report the *Sewing Machine Companies' Case*, it was decided that an action *ex contractu*, by a plaintiff who was a citizen of the state in which the suit was brought, against two defendants, citizens of other states, and a third defendant, a citizen of the same state as the plaintiff, was not removable under the act of 1867, upon the petition of the two non-resident defendants, (18 Wall. 553); and the same principle was reasserted in a subsequent case, where the removal of the *whole suit* under the act of 1867 was sought, and not of the suit as to the non-resident defendants under the act of 1866 (*Annevar v. Bryant*, 21 Wall. 41; *Case v. Douglas*, 1 Dillon, 299; *Johnson v. Monell* (change of residence), 1 Woolw. 390. See *infra*, sec. 10. In the case of *Burnham v. Chicago, Dubuque & Minnesota Railroad Co., et. al.*, the circuit court of the United States, for the district of Iowa (May term, 1876, decided the following: A foreclosure suit by trustees in railway mortgage, who are citizens of *Massachusetts*, was commenced in one of the State courts in Iowa, against the debtor company, (which was an Iowa corporation,) making an *Illinois* and an *Indiana* corporation, each of which claimed liens upon the property, also defendants to the suit; this suit, after all of the defendants had answered, was removed, in 1876, to the circuit court of the United States for the district of Iowa, upon the petition of the *plaintiffs* under the act of 1867. Rev. Stat., sec. 639, sub-division 3. The debtor corporation moved to remand the case to the State court, because *all* of the defendants were not citizen,

right to transfer their suits to the Federal courts.²⁴ This is the first act that in any event extended the right to a *plaintiff* to leave the forum he had voluntarily chosen, and in this respect was an entire departure from all the previous legislation. It is not so difficult to justify the act in this respect, even if it was intended to be permanent, as it is to sustain the provision that this removal may be had, on filing the general affidavit of prejudice or local influence, the truth of which cannot be contested or enquired into, "at *any time* before trial or final hearing of the suit." This provision occasions delay, and is often resorted to for that purpose. But the act of 1867 has been expressly adjudged by the Supreme Court to be constitutional,²⁵ and Congress has not, in our judgment, repealed or modified it. There is no express repeal, and it is not, according to the better view, repealed by implication by the act of March 3, 1875, next to be noticed.²⁶

In passing for the present from this act, we direct attention to Mr. Justice Miller's vindication of it. He says: "I do not join in the condemnation of the act of 1867. It does not allow the removal solely on the ground of citizenship. It requires the requisite citizenship to exist, and in addition thereto requires the existence of prejudice or local influence to be shown by affidavit. In this respect the policy of that act is not unlike that which prevails in perhaps all the states in regard to the change of venue from one county, or one judicial district, to another. *Johnson v. Monell*, 1 Woolw. 390. The object in each case is to secure an impartial tribunal, and the Federal courts are not courts for non-residents more than for residents, and no injustice is done to the latter to be compelled there to litigate controversies which they may have with citizens of other states."²⁷

of the state in which the suit was brought. *Held*, inasmuch as the case was one clearly within sec. 2, of the act of March 3, 1875, in respect of removals, and the controversy one in relation to the priority of liens between citizens of different states, that the circuit court had jurisdiction and that it should not be remanded.

²⁴ *Gaines v. Fuentes*, U. S. Sup. Court, Oct. term, 1875, 3 Cent. L. J. 371.

²⁵ *Chicago & N. W. Railway Co. v. Whitton's Admr.* 13 Wall. 270.

²⁶ *Infra*, sec. 8.

²⁷ *Farmers' etc. Trust Co. v. Maquillan*, 3 Dillon, 379, 381.

SEC. 8. *Act of March 3, 1875.*—We now reach the act of March 3, 1875 (19 Stats. at Large, 470), entitled “an act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes.”

The first section of the act relates to the *original jurisdiction* of the circuit court, civil and criminal, greatly enlarging the jurisdiction in civil cases, and conferring a jurisdiction concurrent with the courts of the several states, using for this purpose the language of article of the constitution (art. 3, sec 2,) which defines and limits the judicial power of the general government. The civil jurisdiction, as there conferred, is given in certain specified cases by reason of the *subject-matter*, irrespective of the citizenship of the parties, and in other cases by reason of *citizenship*, irrespective of the subject-matter. What is material to the present purpose is to notice the clause giving jurisdiction on the ground of citizenship. It removes the limitation prescribed by the Judiciary Act and by the prior removal acts, requiring one of the parties to the suit, that is, either the plaintiffs or the defendants, to be citizens of the state where the suit is brought. On the contrary, the act of March 3, 1875, confers jurisdiction of all suits of a civil nature, over \$500, in which there shall be a controversy between citizens of different states, without requiring any of the parties to be citizens of the state in which the suit is brought. The second section of the act relates to removals, [note to sec. 2, *ante*,] and as to the suits which may be removed, it follows the language of the first section. So that it is true, in general, that any cause may, at the proper time and in the prescribed mode, be removed from the State court to the circuit court of the United States, which, by reason of either its subject-matter or the citizenship of the parties, might have been instituted originally in the Federal court.

The act of 1875 on the one hand, adds to or enlarges the classes of cases that may be removed, and on the other hand restricts the time in which the removal must be applied for within narrower limits than the acts of 1866 and 1867. The

required amount or value is the same as before, *i. e.*, it must exceed \$500, exclusive of costs. In all previous legislation, the right of removal, where citizenship is the ground, is limited to the non-resident citizen, whereas in the act of 1875 it is given to "*either party*," and in certain circumstances to either one or more of the plaintiffs or defendants. This is a radical change of policy.

An analysis of the second section of the act shows that in respect of *subject-matter*, without reference to citizenship, it gives the right of removal of "any suit of a civil nature at law or in equity," involving over \$500, (1) arising under the constitution, or laws or treaties of the United States; (2) or in which the United States shall be plaintiff or petitioner. And in respect of *citizenship*, without regard to subject-matter, it gives the right of removal (1) in any such suit "*in which there shall be a controversy between citizens of different states*;" or (2) a controversy between citizens of the same state claiming lands under grants of different states; or (3) a controversy between citizens of a state and foreign states, citizens, or subjects."

In respect of the *time* in which the removal must be applied for, the provision is that the petition therefor must be filed in the State court "before or at the term at which the cause *could be first tried*, and before the trial thereof." The decisions under the acts of 1866 and 1867 as to removals after one trial had and a new trial granted, which will be alluded to hereafter, may not be and probably are not applicable under the act of 1875."²⁸

Many questions of great importance arise under this act, among which we may mention in this place the question how far it repeals, if at all, the 12th section of the Judiciary Act, the act of 1866 and the act of 1867, or rather these several acts as substantially embodied in the 639th section of the Revised Statutes. There is no express repeal in the act of 1875 (see section 10,) of any specified previous acts, the repeal only being of "all acts and parts of acts in conflict with the provisions of this act." It would seem that sub-

²⁸ See *infra*, sec. 13.

division one of sec. 639, Rev. Stats. (12th section of the Judiciary Act) is practically repealed by reason of being merged in the more enlarged right given by the act of 1875. If a liberal construction shall be, and can constitutionally be, given to the latter portion of section 2 of the act of 1875, the same remark may possibly apply, except as to time, to the sub-division *second* of section 639 of the Rev. Stats., corresponding to the act of 1866. This act is not repealed, probably, by the act of 1875. The *third* sub-division of that section (corresponding to the act of 1867) is broader than the act of 1875, provides for a class of cases not provided for by that act, and while the point is not free of doubt the true view seems to be that at all events this portion of the 639th section remains unrepealed. This has been decided to be so in the 8th circuit by Mr. Justice Miller, and generally in the courts of that circuit, and so far as we are advised, by the circuit courts elsewhere.

The case of *Lockart v. Horn*, 1 Woods, C. C. R. 628, (1871,) contains an expression of the opinion of Mr. Justice Bradley on a point of great interest under the act of March 3, 1875. In conformity with the accepted construction prior to that act he held that the circuit court has no jurisdiction of a cause in which the plaintiff and part only of the defendants were citizens of the *same* state, although they answer without objecting to the jurisdiction. He said: "Were this an original question I should say that the fact of a common state citizenship existing between the complainants and a part only of the defendants, provided the other defendants were citizens of the proper state, would not oust the court of jurisdiction. *It certainly would not under the constitution. The case would still be a controversy between citizens of different states.*" [The act of 1875 uses the language of the constitution, it will be remembered.] "But the strict construction put by the courts upon the Judiciary Act," he continues, "is conclusive against the jurisdiction; and I am bound by it. Nevertheless, the case is such that the complainant may dismiss his bill as to the obnoxious defendants and hold it as to the others. I will permit him to do so. This should be

allowed in all cases where the objection is not made *in limine*."

1 Woods, C. C. R. 628, 634.

SEC. 9. *Nature of suits that may be removed. Practice as to replcader.*

We are prepared after this general survey of the subject to consider in detail the more important topics belonging to it.

As to nature of suits that may be removed under the acts we have been reviewing. The language of section 639 of the Rev. Stats. is "any suit * * * wherein the amount in dispute, * * * exceeds the sum or value of five hundred dollars." The language of the act of 1875 (sec. 2) is "any suit of a civil nature at law or in equity." Although the language is different the meaning is, doubtless, the same. It does not extend to *criminal* prosecutions, being limited to suits of a *civil* nature.²⁹ All cases which fall within the ordinary notion of an action at law on contract or for tort, or of a suit in equity, are undoubtedly embraced by the language. Speaking of the nature of suits which may be removed under the 12th section of the Judiciary Act, (Rev. Stats. § 639, sub-division 1,) Mr. Chief Justice Chase in *West v. Aurora*,³⁰ said: "A suit removable from a State court must be a suit regularly commenced by a citizen of the state in which the suit is brought, by process served upon the defendant who is a citizen of another state, and who, if he does not elect to remove, is bound to submit to the jurisdiction of the State court." This language is, perhaps, too broad to be strictly applicable to all cases, since suits have been held removable, and properly so we think, which were not "regularly commenced" in the State court on process issued from it.³¹

²⁹ See *Rison v. Cribbs*, 1 Dillon, 181, 184; *Green v. United States*, 9 Wall. 655.

³⁰ 6 Wall. 139 (1867).

³¹ *Patterson v. Boom Co.*, 3 Dillon, 465. In the case last cited it was held that a suit pending in a State court, between a land owner and an incorporated company, seeking to appropriate his private property under the right of eminent domain, where the question to be tried is the value of such land, is *a suit of such a nature as may be removed* to the Federal court, although the proceeding in its inception was an appraisement by commissioners appointed under the charter of the company.

The case of *West v. Aurora*, *supra*, is interesting as illustrating a class of questions which arise in respect of removals as a consequence of the practice in the code states of mingling, or rather uniting legal and equitable relief in the *same* suit. In brief the case was this: The plaintiff sued the city of Aurora in the State court on coupons. The city made certain defences, and by an additional answer prayed an injunction to restrain plaintiff from proceeding in any suit on the coupons, and from transferring them, and for a decree that the same be cancelled and delivered up. Upon the filing of this additional answer the plaintiff discontinued his suit, and assuming that he was a defendant to the case made in the additional answer and that this was a new suit against him, applied to remove the cause into the Federal court, under section 12 of the Judiciary Act. The Supreme Court held the case not removable and observed: "The filing of the additional paragraphs did not make a new suit within the meaning of the Judiciary Act. They were in the nature of defensive pleas, coupled with a prayer for injunction and general relief. This, if allowed by the code of Indiana, (as it was,) might give them, in some sense, the character of an original suit, but not such as could be removed from the jurisdiction of the State court," under the Judiciary Act which gives the right "only to a defendant who promptly avails himself of it at the time of appearance," but here the plaintiffs had "submitted themselves, by voluntarily resorting to the State court, to its jurisdiction in its whole extent."³² Some of the cases illustrative of the nature of suits that may be removed are cited in a note.³³

³² See *infra*, sec. 13

³³ Suits by attachment may be removed. *Barney v. Globe Bank*, 5 Blatchf. 107. And ejectment actions. *In re Turner*, 3 Wall. Jr., 260; *Curry v. Beardsley*, 4 Wash. C. C. R. 242; *Allin v. Robinson*, 1 Dillon, 19. And in replevin. *Beecher v. Gillett*, 1 Dillon, 308. And a bill in equity to reform an insurance policy. *Charter Oak Co. v. Star Ins. Co.*, 5 Blatchf. 208. And special statutory proceeding in the nature of a summary remedy to confirm a tax title. *Parker v. Overman*, 18 How. 7, S. C. *Hempstead*, 692.

A proceeding to appropriate private property for public use, which at

Where the case made by the pleadings in the State court is in its nature a *law action*, it must, when removed to the Federal court, proceed as such, and may do so (where the action is a purely legal one) although it is brought in the name of the real party in interest, (as authorized by the State codes,) instead of the person holding the bare legal title.³⁴

Where the suit in the State court is in its nature a *suit in* the time the removal was applied for had assumed the shape of an action at law regularly docketed in the State court, to be tried and determined as other cases, and judgment entered accordingly, is such a *suit* as may be removed. *Patterson v. Boom Co.*, 3 Dillon, 465.

Suit in a State court by strangers, the object of which is *to annul a will* and to recall the decree by which it was allowed to probate, is in effect a suit in equity, and may be removed to the circuit court under the act of March 2, 1867. *Gaines v. Fuentes*, Oct. Term, 1875, U. S. Sup. Court, 3 Cent. L. J. 371; distinguished from *Broderick's Will* case, 21 Wall. and proceedings to probate wills. *Fouvergne v. New Orleans*, 18 How. 470.

As to removal of *torts* by one defendant under act of 1866, *quære* in *Vannevar v. Bryant*, 21 Wall. 41, 43.

Definition of "suit," "action," "case," "cases in law and equity," see Story Com. on Const. secs. 1645, 1647. *City of Charleston v. Weston*, 2 Pet. 449; *Holmes v. Jennison*, 14 Pet. 540; *Ex parte Milligan*, 4 Wall. 2; *Phillips' Pr.* (2d Id.) 13, 55; *West v. Aurora*, 6 Wall. 139.

What is a suit or defence *arising under a law* of the United States, *Turton v. Union Pacific R. R. Co.*, 3 Dillon, 366; *Orner v. Saunders*, *Ib.* 284. *People v. Chicago & Alton R. R. Co.*, (Construction act of Congress of April 20, 1871) 6 Chicago Legal News, 316; *Osborn v. Bank of U. S.*, 9 Wheat. 738.

Act of 1866. Removal by part of defendants. The grantor in a deed of trust conveying the legal title in fee to a trustee to secure the payment of a debt to a third person cannot under the act of 1866 remove a suit to foreclose such deed of trust in which he and the said trustee are defendant's leaving the trustee in the State court; and the reason is that the foreclosure by sale of land requires the presence of the party holding the legal title; and since, under the act of 1866, the cause was not removable as to the trustee, it could not be removed by the mortgagor. *Gardner v. Brown*, U. S. Sup. Court, Oct. Term, 1874, 23 Wall.; *Coal Co. v. Blachford*, 11 Wall. 172; *supra*, sec. 6; *infra*, sec. 13.

³⁴ *Thompson v. Railroad Companies*, 6 Wall. 134; *Weed Sewing Machine Co.*, 3 Dillon, 261; *Bushnell v. Kennedy*, 9 Wall. 391; Act June 1, 1872, 17 Stats. at Large, 197, sec. 5. *Wood v. Davis*, 18 How. 467; *Knapp v. Railroad Co.*, 20 Wall. 117. Compare *Suydam v. Ewing*, 2 Blatchf. 359, as to which *quære*.

ity, it must proceed as an equity cause on its removal to the Federal court. The pleadings and practice in law actions, except where otherwise especially provided by act of Congress, are to be conformed, as nearly as may be, to the pleadings and practice in the State court of the particular state. But in equity it is otherwise. The pleadings and practice in equity causes in the Federal courts are uniform throughout the United States, and are governed by the Equity Rules prescribed by the Supreme Court of the United States and by the practice of the Court of Chancery in Great Britain as it existed before the recent changes in the judicial system of that country. The Federal courts have the same chancery jurisdiction in every State, and equity causes must be kept separate and distinct, from their inception to the end, from law actions, and are to be decided by principles of equity of uniform and general application.³⁵

Where the suit in the State court unites legal and equitable grounds of relief or of defence as authorized by the codes, and it is removed, as it may be if the causes for removal exist, what is to be done with it in the Federal court where law and equity suits and issues must be kept separate and distinct? In such a case a repleader is necessary, and the case must be cast in a legal mold, or in the equity mold, or be cast into two cases, one at law and one in equity, and the Federal court is undoubtedly competent to make all orders necessary to this end.³⁶

In law cases, pure and simple, no repleader in the Federal courts is necessary, especially since the Practice Act of June 1872.³⁷ Nor is a repleader necessary in equity causes where the complaint or petition in the State court contains the substance of a bill in equity adapted to present the plain-

³⁵ *Neves v. Scott*, 13 How. 268. See also *Green v. Custard*, 23 How. 4, where the reader will find, and perhaps be amused by, the phillipic of Mr. Justice Grier against the code system of pleadings and practice. His remarks are unjust to that system properly understood, but they are often deserved by the loose practice which has grown up under it.

³⁶ *Sands v. Smith*, 1 Dillon, 290, note; *Fisk v. Union Pacific R. R.*, 8 Blatchf. 299; *Partridge v. Ins. Co. (set-off)* 15 Wall. 573.

³⁷ Rev. Stats. sec. 914.

tiff's case. But although a repleader in such case be not indispensable, it may often be advisable. In cases, however, where legal and equitable matters are united or mingled, it is necessary, as above stated, to frame the pleadings anew after the cause reaches the Federal court, so as to make it distinctively one at law or one in equity, or by a division into two, the one a law the other an equity suit.³⁸

SEC. 10. *From what Court the Removal may be made—Removal how enforced—Certiorari.*—The language of the Rev. Stats. sec. 639, and of the act of March 3, 1875, is, "any suit in *any* State court," etc. In *Gaines v. Fuentes* the Supreme Court of the United States (Oct. term, 1875,) held that an action in form and purpose to annul a will and to recall the decree by which it is probated, brought in a State court, without separate equity jurisdiction, and which is invested with jurisdiction over the estates of deceased persons, might be removed, under the act of 1867, to the Federal court. Speaking of the case before the court and the act of 1867, Mr. Justice Field observed: "This act covered every possible case involving controversies between citizens of the state where the suit was brought and citizens of other states, if the matter in dispute, exclusive of costs, exceeded the sum of \$500. *It mattered not whether the suit was brought in a State court of limited or general jurisdiction.* The only test was, did it involve a controversy between citizens of the state and citizens of other states, and did the amount in dispute exceed a specified amount? And a controversy was involved in the sense of the statute whenever any property or claim of the parties, capable of pecuniary estimation, was the subject of litigation, and was presented by the pleadings for judicial determination."³⁹

Under the act of March 3, 1875, (sec. 7) the circuit court of the United States, to which any cause shall be removable,

³⁸ See *Dart v. McKinney*, 9 Blatchf. 359; *Akerly v. Vilas*, 1 Bissell, 110; *Green v. Custard*, 23 How. 484; *Fisk v. Union Pacific R. R. Co.* 8 Blatchf. 299; *Partridge v. Ins. Co.*, 15 Wall. 573; *Sands v. Smith*, 1 Dillon, 290; *Thomson v. Railroad Co.*, 6 Wall. 134.

³⁹ *Gaines v. Fuentes, et al.*, 3 Cent. Law Jour. 371.

under its provisions has power to issue a writ of *certiorari* to the State court commanding that court to make return of the record in the cause; and the clerk of the State court is subjected to criminal punishment who refuses, after tender of fees, to the party applying for the removal, a copy of the record.

SEC. 11. *As to Value*.—In all the REMOVAL acts to which we have referred it is made an indispensable element of removability, that the amount in dispute, exclusive of costs, shall "exceed the sum or value of five hundred dollars." This language, as well as that which precedes it, is descriptive of the nature of *suits* that may be removed. The subject-matter of the dispute or of the suit must be property, or money, or some right, the value of which in money is susceptible of judicial ascertainment. The language descriptive of *suits that may be removed* excludes criminal cases and controversies relating to the custody of a child, or the right to personal freedom.⁴⁰

It is not sufficient that the value in dispute *precisely equals* \$500: it must *exceed* that sum or amount.⁴¹

The value of the matter in dispute for the purposes of removal is to be determined by reference to the amount claimed in the declaration, petition or bill of complaint.⁴² In actions on a *money demand* the value in dispute is the debt and damages claimed as stated in the petition or declaration, and in

⁴⁰ Phillips' Pr. (2d Ed.) 82; Lee v. Lee, 8 Pet. 44; Barry v. Mercien, 5 How. 103; Pratt v. Fitzhugh, 1 Black, 271; DeKrafft v. Barney, 2 Black, 704; Sparrow v. Strong, 3 Wall. 97; Gaines v. Fuentes, Sup. Court, Oct. term, 1875; 3 Cent. Law Jour. 371. The suits must relate to claims or property capable of pecuniary estimation. Ib.

⁴¹ Walker v. United States, 4 Wall. 163.

⁴² Gordon v. Longest, 16 Pet. 97; Kanouse v. Martin, 15 How. 198, 207; Ladd v. Tudor, 3 Woodb. & Minot, 325; Muns v. Dupont, 2 Wash. C. C. 463; Bennett v. Butterworth, (detinue) 8 How. 124; Peyton v. Robertson, (replevin) 9 Wheat. 527; United States v. McDowell, (penal bonds) 4 Cranch, 316; Martin v. Taylor, (penalty) 1 Wash. C. C. 1; Postmaster-General v. Cross, (penal bond) 4 Wash. C. C. 326; King v. Wilson, (illegal taxes) 1 Dillon, 555; Hartshorn v. Wright, (ejectment) 1 Pet. C. C. 64; Crawford v. Burnham, (ejectment) 4 Am. Law Times, 228.

the prayer for judgment. For example, if the action be on a note for a fixed sum, and the principal and interest and damages do not all together exceed \$500, it is not removable, although the prayer for judgment may be for an amount greater than \$500. On the other hand, in the case supposed, though the plaintiff might have been entitled to a recovery for more than \$500, yet if the prayer for judgment be for less than that amount, the case could not be removed.⁴³

It is sufficient that the amount in dispute exceeds \$500 *at the time* when the right to a removal accrues and is applied for,—and *interest*, when the right thereto exists and it is claimed, may be regarded in determining the amount or value in controversy.⁴⁴ The State court decisions, proceeding on a different principle, are probably unsound.

In actions *sounding in tort* the damages laid by the plaintiff is the amount of the matter in dispute.⁴⁵

Where the right to a removal has become perfect and complete, it is not in the power of the other party to defeat it in either court by release or by amendment of petition and declaring for less than five hundred dollars.⁴⁶

It is made a condition of the right to an appeal or writ of error to the Supreme Court that the "matter in dispute exceeds the sum or value of two (now five) thousand dollars, exclusive of costs." The cases arising under this clause are collected and accurately stated by Mr. Phillips,⁴⁷ and will be found, in many instances, applicable to questions arising, in this regard, under the removal acts.

In leaving this point, we may be permitted to observe that in our judgment the most serious objection to the removal acts, as they now exist, is the small amount required to authorize a removal. In view of the inconvenience and ex-

⁴³ See *Lee v. Watson*, 1 Wall. 337.

⁴⁴ *McGinnity v. White*, 3 Dillon, 350; *Bank etc. v. Daniel*, 12 Pet. 32; *Merrill v. Pelly*, 16 Wall. 338.

⁴⁵ *Hulsecamp v. Teel*, 2 Dallas, 358; *Gordon v. Longest*, 16 Pet. 97.

⁴⁶ *Kanouse v. Martin*, 15 How. 198; *Wright v. Wells*, 1 Pet. C. C. 220; *Green v. Custard*, 23 How. 468; *Roberts v. Nelson*, 8 Blatchf. 74.

⁴⁷ *Practice of the Supreme Court*, chap. VIII.

use of litigating in the Federal courts, held often more than one hundred miles distant from the residence of the parties; the crowded state of their dockets; and considering the removals, especially by foreign insurance and railway corporations, often have the effect to delay, if not to oppress, those having claims against them, it is quite clear that the ground to justify a removal should be enlarged, or the Federal courts multiplied, or at all events their judicial force increased.

SEC. 12. *Party entitled to a Removal—Corporations—Aliens.*—

Under the 12th section of the Judiciary Act, omitting the case of aliens, the right of removal is limited, as we have seen, to the non-resident defendant, when sued by a resident plaintiff. Under the act of 1866 it is limited, as we have seen, under the restrictions therein imposed, to the non-resident defendant, and it is not given either to the resident defendant or to the resident plaintiff. Under the act of 1867 the right is given, as above shown, under the enumerated conditions, to the plaintiff or defendant, but in either case it is only the non-resident citizen who can remove the case.

Corporations created by the states are within all the removal cases under consideration, and after much uncertainty and fluctuation of opinion in the Supreme Court of the United States, the settled rule now is that a corporation, for all purposes of Federal jurisdiction, is conclusively considered as if it were a citizen of the state which created it, and no averment or proof as to the citizenship of its members elsewhere competent or material.⁴⁸

Railroad Co. v. Harris, 12 Wall. 65, 81; *Railway Co. v. Whitton*, 12 Wall. 270, 285; *Louisville etc. R. R. Co. v. Leston*, 2 How. 497; *Shall v. The Baltimore & Ohio Railroad Co.*, 13 How. 314; *The Cotton Drawbridge Company v. Shepherd, et al.*, 20 How. 232; *Ohio & Mississippi Railroad Company v. Wheeler*, 1 Black, 286; *Trust Co. v. Quillan*, (act of 1867) 3 Dillon, 379; *Minnett v. Wilwaukee & St. Paul Railway Co.*, (act of 1867) 3 Dillon, 460. As to the effect on Federal jurisdiction (where it is dependent upon the citizenship of the parties) of *arters granted by different states to the same company* or to companies constructing the same line of road, and as to the *effect of consolidation* on the jurisdiction of the Federal courts, the following are the principal

A corporation of another state may remove a cause commenced by attachment of property, although the action could not, by reason of a citizenship, (in a legal sense,) out of the district and inability to serve it within the district, be commenced by original process in the circuit court of the United States;⁴⁹ and the right to a removal in such a case is not lost by reason of such corporation having an office for the transaction of business in the state in which the suit is brought.⁵⁰ Nor can such a corporation be deprived of the right of removal by state legislation.⁵¹

Incorporated bodies chartered by foreign countries may remove cases under the provisions as to *aliens*.⁵²

SEC. 13.—*The time when the application must be made.*—Under the 12th section of the Judiciary Act, (now Rev. Stats., sec. 639, sub-division 1,) the application must be made by the defendant “at the *time of entering his appearance* in the State court.” Under this provision the defendant must promptly avail himself of this right, and he waives it if he demurs, or pleads, or answers, or otherwise submits himself to the jurisdiction of the State court.⁵³

cases: *Ohio & Miss. R. R. Co. v. Wheeler*, 1 Black, 286; *Balt. & Ohio R. R. Co. v. Harris*, 12 Wall. 65; *Ch. & N. W. R. R. Co. v. Whitton*, 13 Wall. 270; *Williams v. M. K. & T. Railway Co.*, 3 Dillon, 267. See, also, *Marshal v. B. & O. R. R. Co.* 16 How. 314; *Balt. & O. R. R. Co. v. Gallahue's Administrator*, 12 Grattan, 658; *Same v. Supervisors*, 1 West. Va. 19; *Goshorn v. Supervisors*, 1 West. Va. 308. See *North-western Railway Company v. Chicago & Pacific Railway Company*, 8 *Chicago Legal News*, (Nov. 14, 1874,) 57, decided by Circuit Judge Drummond, as to the effect of consolidation under charters of different states and the citizenship of the consolidated company.

⁴⁹ *Bliven v. New Eng. Screw Co.*, 3 Blatchf. 111; *Barney v. Globe Bank*, 5 Ib. 107; *Sayles v. N. W. Ins. Co.*, 2 Curtis, 212.

⁵⁰ *Hatch v. Chicago etc. R. R. Co.*, 6 Blatchf. 105.

⁵¹ *Chicago etc. Railway Co. v. Whitton's Admrs.*, 13 Wall. 270; *ante*, sec. 3 and cases cited.

⁵² *Terry v. Insurance Co.*, 3 Dillon, 408; 1 Kent's Com. 348; see also *Angell & Ames on Corporations*, secs. 377, 378, and 1 *Abbott's U. S. Practice*, 216; *Fisk v. Ch. etc. Railroad Co.*, 53 Barb. 472; 3 *Abb. Pr. Rep.* N. S. 453; *King of Spain v. Oliver*, 2 *Washington C. C.* 429.

⁵³ *West v. Aurora City*, 6 Wall. 139; *Sweeney v. Coffin*, 1 Dillon, 73; *Webster v. Crothers*, 1 Dillon, 301; *Johnson v. Monell*, 1 *Woolw.* 390;

Under the acts of 1866 and 1867, (now Rev. Stat., sec. 639, sub-divisions 2 and 3,) the time is enlarged, and the petition for the removal may be made "at *any time before* the trial or final hearing of the suit" in the State court. The word "trial" refers to cases at law—"hearing" to suits in equity.⁵⁴ Under this language the petition for the removal *may*, it is certain, be made at any time before entering upon the final trial, or the hearing on the merits, and it *must* be made before final judgment in the court of original jurisdiction, and it is too late to make it after the cause has reached, and is pending in the State appellate court.⁵⁵

"Before final hearing or trial clearly means," says Mr. Justice Field, "before final judgment in the court of original jurisdiction, where the suit is brought. Whether it may not mean still more—before the hearing or trial of the suit has commenced, which is followed by such judgment—may be questioned, but it is unnecessary to determine that question in this case."⁵⁶ It would seem, however, that it would be

McBratney v. Usher, 1 Dillon, 367, 369; Robinson v. Potter, (too late after reference and continuance,) 43 N. H. 188; Savings Bank v. Benton, 2 Metc. (Ky.) 240; *supra*, sec. 5.

As to the right of *different* defendants to remove at *different times*: see Smith v. Rines, 2 Sumn. 338; Ward v. Arrendondo, 1 Paine, 410; Beardsley v. Torrey, 4 Wash. C. C. 286; Field v. Lownsdale, 1 Deady, 288; Fisk v. Union Pacific R. R. Co., 8 Blatchf. 299.

The State court cannot restore right of removal by allowing an appearance to be entered *nunc pro tunc*. Ward v. Arrendondo, 1 Paine, 410; Gibson v. Johnson, Pet. C. C. 44.

⁵⁴ Vannevar v. Bryant, 21 Wall. 41, 43, *per* Waite, C. J.

⁵⁵ Stevenson v. Williams, 19 Wall. 572; Vannevar v. Bryant, 21 Wall. 41, 43; Waggener v. Cheek, 2 Dillon, 560; Kellogg v. Hughes, 3 Dillon, 357; Dart v. McKinney, 9 Blatchf. 359; Johnson v. Monell, (change of residence pending suit,) 1 Woolw. 390; Minnett v. Milwaukee & St. Paul Railway Co., 3 Dillon, 460, denying Galpin v. Critchlow, 13 Am. Law Reg. N. S. 137; s. c. — Mass. —, and Whittier v. Hartford Ins. Co., 14 Am. Law Reg. N. S. 121; s. c. 55 N. H. 141; see Ins. Co. v. Dunn, 19 Wall. 214, 225; Akerley v. Vilas, 1 Abb. U. S. Rep. 284; s. c. 1 Bissell, 110; Murray v. Justices, 9 Wall. 274; Fashnacht v. Frank, U. S. Sup. Court, Oct. 1874.

⁵⁶ Stevenson v. Williams, *supra*.

too late to defer the application until the trial was actually entered on.

Although there is some conflict between the State and Federal courts on the point, yet the weight of the cases and the authoritative view is, that if the trial court has wholly *set aside a verdict, and granted a new trial*, or if the State appellate court has *wholly reversed the judgment* and remanded the case to the court of original jurisdiction for a trial *de novo*, then, in either event, it is not too late, under the act of 1866 or 1867, to apply to remove the cause, as it is in the same posture as before the first trial or hearing was had.⁵⁷

The case of the Insurance Co. v. Dunn, (19 Wall. 214,) affords a striking illustration of the meaning of the phrase, "*final judgment*" in the acts of 1867. The plaintiff in that case had a verdict and judgment thereon in one of the courts of Ohio. The defendant (the Insurance Company) under the statute of the state, applied for a new trial, and gave bond in that behalf. This had the effect, under the statute of the state, to vacate the verdict and judgment as if a new trial had been granted, except *that lien of the judgment remained as security for the plaintiff*. When the case was in this *status*, the Company applied to remove the cause under the act of 1867, and it was held that there had been no *final* trial, that the application was in time, that the suit was removable; and the subsequent judgment in the State court was reversed by the Supreme Court of the United States.

But a cause cannot be removed where a verdict has been rendered, and a motion is *pending* to set the verdict aside. Such a motion must be disposed of, and be granted, so that the right to a second trial is complete, before the cause can be transferred, since, says the Chief Justice, "every trial of a cause is *final* until, in some form, it has been vacated. Causes cannot be removed to the circuit court for a review of the action of the State court, but only for trial. The circuit court cannot, after a trial in a State court, determine

⁵⁷ See cases last cited, and particularly Ins. Co. v. Dunn, 19 Wall. 214; Vannevar v. Bryant, 21 Wall. 41, 43; Andrews v. Garrett, 2 Cent. Law Journal, 797.

whether there shall be another. That is for the State court. To authorize the removal the action must, at the time of the application, be actually pending for trial."⁵⁸

Under the acts of 1866 and 1867, it is sufficient, *it seems*, as respects citizenship, that the defendant applying for the removal is, *at the time* of filing his petition therefor, a citizen of another state, and the plaintiff a citizen of the state in which the suit is brought.⁵⁹

One of several defendants sued as *co-partners* may, if the other requisites exist, have the cause removed into the Federal court, so far as concerns himself, under the act of 1866.⁶⁰

Under the act of March 3, 1875, (sec. 3), the time for the removal is greater than under the Judiciary Act, but not so great as under the acts of 1866 and 1867 last noticed. The act of 1875 requires the petition in the State court to be made and filed therein "before or at the term at which such cause *could be first tried*, and before the trial thereof." The word term as here used means, according to the construction which it has received in the 8th judicial circuit, the term at which, under the legislation of the state and the rules of practice pursuant thereto, the cause is first triable, *i. e.* subject to be tried on its merits, not necessarily the term when owing to press of business or arrearages it may be first reached, in its order, for actual trial.⁶¹ This act gives the right of removal to either party—the resident as well as the non-resident party—and no affidavit of prejudice is required, and it was the obvious purpose of Congress by the use of

⁵⁸ *Vannevar v. Bryant*, 21 Wall. 41, 43; see *Whittier v. Hartford Ins. Co.*, 55 N. H. 141.

⁵⁹ *McGinnity v. White*, 3 Dillon, 350.

⁶⁰ *Ib.*; and see *supra* section 9, note.

⁶¹ "We understand that Judge Davis, when sitting as circuit justice for the district of Indiana, held that the application for removal must be made at the first term at which the cause could be put at issue, and before the trial thereof." *Buskirk's Indiana Practice*, 459.

The objection that the application to remove the cause was not made at a time may be *conclusively waived* by submitting to the jurisdiction of the circuit court by taking testimony and by delaying the objection for an unreasonable time. *French v. Hay*, 22 Wall. 244.

the words "*before* or at, etc., the term at which the cause *could* be *first* tried," etc., to require the election to be taken at the first term at which, under the law, the cause was triable on its merits.

SEC. 14. *Mode of making application for removal. Bond, etc.*—Under the Rev. Stats. Sec. 639, the applicant for the removal must file his petition therefor, stating the grounds for the removal, and offer in the State court good and sufficient surety for his entering in the circuit court, on the first day of its next session, copies of the process [proceedings] against him, and of all pleadings, depositions and other proceedings in the cause, etc. This petition is not required to be verified.

Under the act of 1867 (Rev. Stats., sec. 639, sub-division 3) there is required in addition to the petition for removal an *affidavit of prejudice or local influence*, which, wherever possible, should be made by the party himself, or if the petition is on behalf of a corporation by the president or managing or other proper officer or by some person authorized to control the case. The decisions upon the point whether an attorney may make the affidavit in any case or what officers of a corporation may make it, are few.⁶²

It is not necessary to state in the affidavit the reasons or facts showing the local influence or prejudice, for this is not a traversable matter either in the State or Federal court.⁶³

As the party himself is a non-resident and may not be as well advised as his local agent or attorney as to the existence of local influence or prejudice, there would seem to be no reason for requiring the affidavit in all cases to be made by the party; and some parties, as infants or persons *non compos mentis*, could not make it. If an attorney or agent

⁶² See *Anony.*, 1 Dillon, 298, note; *Trust Co. v. Maquillan*, 3 Dillon, 379, 380, where Mr. Justice Miller is reported as saying: "I am not impressed with the soundness of the argument that because corporations cannot make an affidavit, except through the proper officers, they were not within the contemplation of Congress. I think that the proper officers of corporations may make the necessary affidavit to procure the removal." *Minnett v. Milwaukee etc. Railway Co.*, 3 Dillon, 460.

⁶³ *Anony.*, 1 Dillon, 298, note.

makes the affidavit, it is good practice to state why it is not made by the party himself.

Under the act of March 3, 1875, the removal is effected by the proper party making and filing, in the State court, a petition in the suit to be removed, setting forth therein the grounds for the removal. This petition is not required to be verified. Petitions for removal usually state not only the grounds for the removal arising from citizenship or the nature of the subject-matter, but also that the amount in dispute exceeds \$500. Where, however, the amount is shown by the pleadings in the case, to exceed this sum, it is not necessary, although it is not improper, to make a statement on the petition for the removal as to the sum or value in dispute.⁶⁴ The petition for removal should be carefully framed, and the careful practitioner will follow the exact language of the statute in stating the grounds for the removal.⁶⁵

It has been decided by some of the State courts that the petition for the removal must expressly state that the parties were citizens of the respective states *at the time the suit was commenced* and that it is not sufficient to state it in the present tense or as of the time when the petition for removal was made or filed.⁶⁶ This view is open to great doubt. It overlooks the purpose of the constitution and of Congress in providing for removals, which was to give a resort by the non-resident party to a tribunal in which the citizen of the state should have no advantage over him. It is inconsistent with several adjudications under the later acts.⁶⁷ Whatever may be the law on the point, the prudent attorney will state

⁶⁴ *Abranches v. Schell*, 4 Blatchf. 256; *Turton v. U. P. R. R. Co.*, 3 Dillon, 366.

⁶⁵ *Railway Co. v. Ramsey*, 22 Wall. 328, where the requisites, function and effect of the petition for removal are tersely stated by the chief justice.

⁶⁶ *Pechner v. Phoenix Ins. Co.*, N. Y. Court of Appeals, May, 1875; *Holden v. Putnam Fire Ins. Co.*, 46 N. Y. 1; *Indianapolis etc. R. R. Co. v. Risley*, 50 Ind. 60; *Savings Bank v. Benton*, 2 Metc. (Ky.) 240; *People v. Superior Court*, 34 Ill. 356.

⁶⁷ *Johnson v. Monell*, 1 Woolw. 390; *McGinnity v. White*, 3 Dillon, 50.

in his petition for removal that the plaintiff, when the suit in the State court was commenced was and still is a citizen of the state in which the suit is brought, etc., etc.

Surety.—Bond.—Under section 639 of the Rev. Stats., good and sufficient surety is to be offered in the State court, at the time of filing the petition for the removal, for the petitioner's "entering in the circuit court on the first day of its next session copies of the process," etc. This is substantially the requirement in this regard of the act of March 3, 1875 (sec. 3,) except that the surety is to be given by ^a "bond" which is conditioned not only for the entering of a copy of the record of the State court in the suit, but for "paying all costs that may be awarded by said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto." But if the circuit court should hold that the suit was removable it would not, probably, dismiss or remand it because the bond did not contain this condition as to costs or was otherwise informal.⁶⁸ This section has been construed by the learned circuit judge of the 7th circuit, who holds that "it did not intend that the suit should be dismissed or remanded on account of irregularities, provided it satisfactorily appears that the circuit court has jurisdiction of the case."⁶⁹ But if the removal is not applied for in time this is not treated as an unimportant irregularity, but the uniform practice is to remand the case. But the objection must be made seasonably or it will be deemed waived.⁷⁰

SEC. 15.—*Effect of Petition for Removal on Jurisdiction of the State court.*—The removal acts provide that upon the filing of the proper petition and the offer of good and sufficient surety or bond, "it shall be the duty of the State court to accept the surety," [under act of March 3, 1875, "to accept said petition and bond"] "and to proceed no further in the suit," [under the act of 1866] "no further in the cause against the petitioner for removal."⁷¹ If the case be within the

⁶⁸ Section 5 of the act of March 3, 1875.

⁶⁹ Osgood v. Chicago etc. Railroad Co., 7 Chicago Legal News, 241; S. C. 2 Cent. L. J. 275, and on re-argument 2 Cent. L. J. 283. See, also, Parker v. Overman, 18 How. 137, 141.

⁷⁰ French v. Hay, 22 Wall. 244.

⁷¹ Rev. Stats. sec. 639.

ct of Congress, and the petition is in due form, accompanied with the offer of the required surety or bond, the statute is that the State court *must* accept the surety or the petition and bond, and proceed no further in the case. Under such circumstances the State court has no discretion to refuse the removal, and can do nothing to affect the right, and its right-ful jurisdiction ceases *eo instanti*; no order for the removal necessary, and every subsequent exercise of jurisdiction by the State court, including its judgment, if one is rendered, erroneous.⁷² And if the right of removal has once become perfect, it cannot be taken away by subsequent amendment in the State court or Federal court, or by a release of part of the debt or damages claimed or otherwise.⁷³

If the petition in connection with the pleadings does not show that the case is removable, the jurisdiction of the State court is not ousted, and its subsequent proceedings, if it refused to order the removal, would not, it is supposed, be void or erroneous.⁷⁴

And the same principle would apply, probably, if *no* security or bond whatever was offered and no removal ordered, since in that event the prescribed conditions for the removal

⁷² How far the subsequent proceedings in the State court have any validity if a proper application for removal be refused, see *Herryford v. Anna Ins. Co.*, 42 Mo. 151, 153, where it is said "they are *coram non judice*;" *P. Akerley v. Vilas*, 1 Abb. U. S. 284, s. c. 1 Bissell, 110; *Fisk v. Union Pacific R. R. Co.*, 6 Blatchf. 362, s. c. 8 Ib. 243; *Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149; and compare with *Kanouse v. Martin*, 15 How. 198; *Gordon v. Longest*, 16 Pet. 97; *Insurance Co. v. Dunn*, 19 Wall. 214; *French v. Hay*, 22 Wall. 250; *Hadley v. Dunlap*, 10 Ohio, St. 1, 8, where the matter is discussed by Scott, J.

⁷³ *Kanouse v. Martin* (amendment), 15 How. 198, s. c. 1 Blatchf. 149; *Add v. Tudor*, 3 Woodb. & Minot, 325; *Muns v. Dupont*, 2 Wash. C. 463; *Akerly v. Vilas*, 1 Abb. U. S. 284, s. c. 1 Bissell, 110; *Hatch v. Rock Island etc. R. R. Co.*, 6 Blatchf. 105; *Fisk v. Union Pacific R. R. Co.*, 6 Ib. 362, s. c. 8 Ib. 243; *Roberts v. Nelson* (amount), 8 Ib. 74; *Gordon v. Longest*, 16 Pet. 97; *Matthews v. Lyell* (as to right to dismiss), *McLean*, 13; *Wright v. Wells*, Pet. C. C. 220.

⁷⁴ *Gordon v. Longest*, 16 Pet. 97; *Insurance Co. v. Dunn*, 19 Wall. 214; *Kanouse v. Martin*, 14 How. 23, s. c. 15 How. 198; *Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149; *Holden v. Putnam Fire Insurance Co.*, 5 N. Y. 1; *Savings Bank v. Benton*, 2 Metc. (Ky.) 240.

have not been complied with; but it is doubtful, especially under the act of 1875, whether it belongs to the State court to judge of the sufficiency of the surety offered and to refuse a removal because the surety or bond is not sufficient, and exercise jurisdiction subsequently on this ground alone.⁷⁵

In the case of *Osgood v. Chicago etc. R. R. Co.*⁷⁶ the petition and bond for the removal of the cause were filed in the vacation of the State court with the clerk, and it was held that this, without any action of the court as to the sufficiency of the petition or bond, *ipso facto*, deprived the State court of jurisdiction—the sufficiency of these (under the act of 1875) being for the circuit court. Judge Drummond says: “It is true that under the statute the bond must be good and sufficient security, but it does not declare that it shall be approved by the judge. It requires the State court to accept the petition and bond, and proceed no further in the case.”⁷⁷ The fifth section of the act of March 3, 1875, tends to confirm the view that the State court is not authorized to make a judicial enquiry into and decision on the sufficiency of the bond. Its determination that a sufficient petition is not sufficient, cannot deprive the Federal court of jurisdiction. So its determination that an insufficient petition is sufficient, while it is not immaterial, especially if accompanied with an order for removal, will not conclude that question, and it will be the duty of the Federal court, on motion, to remand the cause.⁷⁸

SEC. 16. *Effect on the Jurisdiction of the Federal Court.*—“Upon the copy of the record of the suit being entered as aforesaid in the circuit court of the United States,” the provision is “that the cause shall then proceed in the same man-

⁷⁵ See *nisi prius* opinion of Morton, J. in *Bank v. King Bridge Co.*, 2 Cent. Law Journal, .505, denying *Osgood v. Chicago etc. R. R. Co.*, *infra*, s. c. in circuit court U. S., 2 Cent. Law Journal 616. See *Ib.* 679, 730. See, also, *dictum* of the ch. justice in *Railway Co. v. Ramsey*, 22 Wall. 328, that “if upon the hearing of the petition it is sustained by proof, the State court can proceed no further”—but *quære* whether the State court can hear and determine whether the proofs sustain the petition.

⁷⁶ 2 Cent. Law Journal, 275, s. c. 7 Chicago Legal News, 241.

⁷⁷ See 2 Cent. Law Journal, 616.

⁷⁸ *Urtetiqui v. D'Arcy*, 9 Pet. 692.

ner as if it had been originally commenced in the said circuit court." "And the copies of the pleadings shall have the same same force and effect, in every respect and for every purpose, as the original pleadings would have had by the laws and practice of the courts of the state if the cause had remained in the State court."⁷⁹

The jurisdiction of the circuit court does not, probably, attach until the record of the State court is entered therein. If it be entered *before* the time, it has been made a question whether it will *then* attach. For some purposes it would seem that it might; as, for example, if it became necessary meanwhile to issue an injunction or appoint a receiver, (which should be done, however, only upon notice,) in order to protect the rights of the parties or to preserve the property in litigation.

By express provision of *existing statutes*, *attachments* of property hold, *bonds* of indemnity remain valid, and writs of *injunction* continue in force notwithstanding the removal, until dissolved or modified by the circuit court.⁸⁰

SEC. 17. *Remanding Cause to the State Court.*—If the petition for the removal and the copy of the pleadings or record in the State court do not show that the case was removable under the legislation of Congress; or if they show that the removal was not applied for in time; or that any other substantial condition attached to the right of removal, such as value, has not been complied with, but the removal has, nevertheless, been ordered, the other party may move to remand the cause to the State court, and it ought to be remanded accordingly. This was the uniform practice before the act of 1875, but under the 5th section of that act, while it is clear that a cause ought to be remanded which is not removable, or in which the right to a removal has been waived because not applied for in time, it is doubtful whether, if the record

⁷⁹ Rev. Stats. sec. 639. And see act March 3, 1875, secs. 3, 6.

⁸⁰ Rev. Stats. sec. 646; act March 3, 1875, sec. 4. See *New England Screw Co. v. Bliven*, 3 Blatchf. 240, but *quære?* *Garden Manf. Co. v. Smith*, (renewal of motion to dissolve attachment) 1 Dillon 305. And see *Hatch v. Rock Island etc. R. R. Co.*, 6 Blatchf. 105.

was in fact filed in the Federal court in time, defects connected with the giving of the surety or bond, or other irregularities which have not worked any prejudice, will be ground for dismissing or remanding the case.⁸¹ The motion to remand must be based upon the petition for removal and the record as it is sent up from the State court. If the petition, in connection with the record, is sufficient on its face, but states as ground of removal facts which are not true, as for example, in regard to citizenship, or value, where the value does not appear in the pleadings, issue may be taken thereon in the circuit court by a plea in the nature of a plea in abatement;⁸² but such an enquiry cannot be gone into in the State court.

Where the State court has ordered the removal improperly, the circuit court should remand the suit. If the State court has remitted the case, though erroneously, its jurisdiction is at an end until it is restored by the action of the Federal courts. If the circuit court erroneously refuses to remand such a case, the proper remedy of the party is not by proceeding in the State court at the same time the cause is in the circuit court, but is alone in the Federal court; the action of the circuit court in remanding for refusing to remand a cause being reviewable on error or appeal by the Supreme Court.⁸³

⁸¹ See *supra* sec. 9, as to *time* of applying for removal.

⁸² *Coal Co. v. Blatchford*, 11 Wall. 172.

⁸³ *Insurance Co. v. Dunn*, 19 Wall. 214, 223; *Gordon v. Longest*, 16 Pet. 97; Act March 3, 1875, sec. 5; *Green v. Custard*, 23 How. 484; *Fashnacht v. Frank* (effect of appeal), U. S. Sup. Court, Oct. Term, 1874, 23 Wall. See 2 Cent. L. J. 290.

Where in a suit removed into the circuit court the papers were afterwards destroyed by fire, the parties stipulated in writing that the cause was transferred *in accordance with the statute in such case provided*, the Supreme Court will presume, in the absence of proof to the contrary, that the citizenship requisite to give jurisdiction was shown in some proper manner, though it did not appear on the face of the pleadings. *Railroad Co. v. Ramsey*, 22 Wall. 322. In a petition for removal it was stated that the parties "resided" in such and such states. The Supreme Court said: "'citizenship' and 'residence' are not synonymous terms; but as the record [in the circuit court] was afterwards so

Where the State court asserts jurisdiction after a proper application for removal, the question of jurisdiction is not waived by the party entitled to the removal by reason of his appearing and contesting in the State court the claim or matter in dispute.⁸⁴ If in such case the judgment of the State court be against him on the trial or hearing he may appeal to the highest court of the state and if the decision below is there affirmed, he may sue out a writ of error from the Supreme Court of the United States, and if the record shows that the removal of the suit was improperly denied, that court will not examine into the merits of the case or generally into the record, but will reverse the judgment of the highest court of the state, with directions to reverse the judgment of the lower State court and to order a transfer of the cause from that court to the circuit court of the United States, pursuant to the petition for the removal originally filed in such State court.⁸⁵ The circuit court has the power to protect its suitors by injunction against a judgment in the State court rendered subsequent to a proper application to remove the cause⁸⁶

amended as to show conclusively the citizenship of the parties, the court below had, and this court have, undoubted jurisdiction of the case." *Parker v. Overman*, 18 How. 137, 141.

As to appeals from the decision of the *nisi prius* State court granting or refusing the petition for removal to *the appellate court of the state*, and the effect thereof, see, *Kanouse v. Martin*, 15 How. 198, S. C. 14 How. 23; S. C. 1 *Blatchf.* 149; *Burson v. Park Bank*, 40 Ind. 173; *Western Union Tel. Co. v. Dickinson*, 40 Ind. 444; *Indianapolis etc. R. R. Co. v. Risley*, 50 Ind. 60; *Whiton v. R. R. Co.*, 25 Wis. 424; *Railroad Co. v. Whiton*, 13 Wall. 270; *Akerly v. Vilas*, 24 Wis. 165; S. C. 1 *Bissell*, 110; *Home Ins. Co. v. Dunn*, 20 Ohio St. 175; *Ins. Co. v. Dunn*, 19 Wall. 214; *Atlas Ins. Co. v. Byrus*, 45 Ind. 133; *Gordon v. Longest*, 16 Pet. 97; *Hadley v. Dunlap*, 10 Ohio St. 1; *Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149; *Holden v. Putnam Ins. Co.*, 46 N. Y. 1; *People v. Sup. Court*, 34 Ill. 356; *Savings Bank v. Benton*, 2 Metc. (Ky.) 240.

⁸⁴ *Insurance Co. v. Dunn*, 19 Wall. 214; *Gordon v. Longest*, 16 Pet. 98; *Kanouse v. Martin*, 15 How. 198; *Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149; *Hadley v. Dunlap*, 10 Ohio St. 1.

⁸⁵ *Gaines v. Fuentes*, Sup. Court U. S. Oct. Term, 1875, 3 Cent. Law Jour. 371, and cases last cited.

⁸⁶ *French v. Hay*, 22 Wall. 250.

If a cause be improperly removed into the circuit court and it entertains jurisdiction in a case in which by law it can have none, its judgment will be reversed by the Supreme Court, with directions to the circuit court to remand the same to the State court whence it was improperly taken.⁸⁷

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⁸⁷ Knapp v. Railroad Co., 20 Wall. 117.

IV. STOCK-BROKERAGE.

the Supreme Court of the United States, in the case of *Thomson v. Thomson*, decided at the October Term, 1875, 3 *U. S. Law Journal*, 383, has made a ruling in respect to brokerage which is entitled to peculiar attention. The facts, stated by Mr. Justice Hunt, in his opinion, were these: The plaintiff alleged that on the 11th day of July, 1867, he obtained and sold to the defendants a quantity of iron thereunto to arrive, at prices named, and that the defendants refused to accept the same and pay the purchase-money therefor; that the iron arrived in due time, was tendered to the defendants, who refused to receive and pay for the same, and that the plaintiff afterward sold the same at a loss of \$31, which sum he requires the defendants to make good to him. The defendants interposed a general denial. Upon trial the case came down to this: The plaintiff employed certain brokers of the city of New York to make sale for him of the expected iron. The brokers made sale for the same to the defendants at 12 3-4 cents per pound in gold, cash. The following memorandum of sale was made by the brokers, viz:

“NEW YORK, July 10, 1867.

Sold for Messrs. Butler & Co., Boston, to Messrs. A. A. Thomson & Co., New York, seven hundred and five (705) lbs first quality Russia sheet-iron, to arrive at New York, at twelve and three-quarters (12 3-4) cents per pound, gold, less actual tare.

Iron due about September 1, 1867.

“WHITE & HAZZARD, Brokers.”

The defendants contended that, under the statute of frauds of the state of New York, the contract was not obligatory on them. The judge before whom the cause was tried at the

circuit concurred in this view, and ordered judgment for the defendants. From this judgment a writ of error was taken to the Supreme Court of the United States. The contract was attacked on two grounds: first, that it contravened the statute of frauds, and secondly, that at common law there was no valid seller, because there was no purchaser. To this Judge Hunt replies as follows:

“How, then, can there be a sale of 705 packs of iron unless there be a purchase of it? How can there be a seller unless there be likewise a purchaser? These authorities require the existence of both. The essential idea of a sale is that of an agreement, or meeting of minds by which a title passes from one and vests in another. A man cannot sell his chattel by a perfected sale, and still remain its owner. There may be an offer to sell, subject to acceptance, which would bind the party offering, and not the other party until acceptance. The same may be said of an optional purchase upon a sufficient consideration. There is also a class of cases under the statute of frauds where it is held that the party who has signed the contract may be held chargeable upon it, and the other party, who has not furnished that evidence against himself, will not be thus chargeable. Unilateral contracts have been the subject of much discussion, which we do not propose here to repeat. In *Thornton v. Kempster*, 5 Taunt. 788, it is said: ‘Contracts may exist which, by reason of the statute of frauds, could be enforced by one party although they could not be enforced by the other party. The statute of frauds in that respect throws a difficulty in the way of the *evidence*. The objection does not interfere with the substance of the contract, and it is the negligence of the other party that he did not take care to obtain and preserve admissible evidence to enable himself also to enforce it.’

“The statute of 29 Car. II, ch. 3, on which this decision is based, that ‘no contract for the sale of goods, wares and merchandise for price of £10 sterling or upwards, shall be allowed to be good except the buyer,’ etc., is in legal effect the same as that of the statute of New York already cited. See *Justice v. Lang*, 42 N. Y. 203, that such is the effect of

statute of New York. The case before us does not fall in this class. There the contract is signed by one party only. Here both have signed the paper, and if a contract is made, it is a mutual one. Both are liable, or neither.

Under these authorities it seems clear that there can be no sale unless there is a purchase, as there can be no purchase unless there be a sale. When, therefore, the parties mutually certify and declare in writing that Butler & Co. have sold a certain amount of iron to Thomson & Co. at a price named, there is included therein a certificate and declaration that Thomson & Co. have bought the iron at that price."

No doubt this conclusion is in sympathy with recent English and American rulings. *Radford v. Newell*, L. R. 3 C. P. 121, relied on by Judge Hunt, is directly in point, and exhibits a still stronger case than that now before us, for the memorandum on which, in *Radford v. Newell*, suit was brought, was so obscure as to require parol evidence to make it intelligible. However incongruous the positions here reached may be with other settled doctrines of agency, and however democratic may appear the privilege it gives to a broker, of binding both parties by his acts, yet it is not desirable that the Supreme Court should establish in this relation a rule different from that which obtains in England and in the great commercial centers of this country. We must therefore conclude that a broker may, by his memorandum of purchase, or by his bought and sold notes, make evidence of a valid contract, both under the statute of frauds and at common law. But clear as this may be, the position that follows cannot be so readily accepted. Why should the *buyer* be sued on a *bought* note? The sold note simply says to the seller that certain property was sold on his account to the buyer, but there is nothing in this note that binds the buyer. Undoubtedly when the bought note is given to the buyer, and accepted by him, this binds him, and the proper course would be to sue him on this note. It is true that this note is in the buyers possession, and that we have the opinion of Lord Justice Blackburn, J., in 17 Q. B. 103, to the effect that it is proper to

account of himself. It is true that when acting for himself he may use the name of a fictitious principal, and in this case he may preserve the forms of brokerage. As acting directly for himself, he cannot appear in the stock market as a broker. He becomes a jobber, in such case, according to the English practice. He may be a member of the stock exchange if he is not, when doing business on his own account, a broker.

A professional speculator, so far as concerns a particular transaction, or line of transactions, is either a "bull" or a "bear." A bull is a speculator interested in raising the price of the stock as to which he is operating. "He buys for the settlement, with a view of selling at some future date at a higher price, and gaining by the difference."² But even without buying for the settlement, he may become a bull if his object be, by any process, to raise the price of the stock. It is unfortunate that in brokerage, as war, all stratagems are allowed fair. Lord Cochrane's trial before Lord Ellenborough, though it may not have justified the verdict of guilty rendered against Lord Cochrane, showed that it was a common practice in the stock exchange to operate on stocks by fictitious dispatches; and while the great banking houses were not chargeable with throwing false information on the market, they made immense sums by suppressing information that was true. The Rothschilds, for instance, had a corps of spies and express agents stationed throughout Europe, through whom they obtained the earliest information of all great political events; and this information they kept secret until it was fully utilized by themselves. To bull the market by withholding true bad news, would be, if Cicero's famous argument be true, as fraudulent as to bull it by disseminating false good news. The bear is the opposite of the bull. His object is to depress prices below their real value. "He calls for the settlement, hoping to buy back at a cheaper price, and gain by the difference." (Ibid.) A speculator, for instance, is anxious to buy cheap a block of "stranger" investments; and numberless are the agencies un-

der his power to bring down the price. At one moment the proceedings of an enthusiastic granger meeting is telegraphed over the land. At another we will have information that the grasshoppers selected the line of the granger roads for a special devastation. At another we are advised that because several of the judges of the Supreme Court are trafficking for the presidency, it will be impossible until the autumn to wring from that august tribunal a judgment that will secure to the railroads their just rights. At another moment we will be led to deplore those disruptive rivalries which cause railway corporations, instead of agreeing in their nests and feeding their stockholders, to attempt to destroy each other by reducing their rates below the running expenses; and this, we are told, is a law of railroads, which in the Northwest knows no variations. It is true that to-morrow, when the bear has become a bull, when he has bought in at the lowest price he can purchase and wants to sell at the highest—all this is reversed. Grangerism is spurned as a delusion, and the farmer, with tears of wise penitence, begs that rates may be put up so that the railroads may live. Grasshoppers are no longer a burden, and if they are, they carefully avoid countries which are traversed by locomotives. The judges of the Supreme Court are unanimous in favor of the roads, and hold back their opinion only to keep the question out of politics. So we may hear to-morrow, and this from the same parties who are flooding us with bad news to-day.

Yet, in speaking of a bear ring, we must not suppose that the bear ever comes before the public in his own person. The real bull or bear never exhibits himself; if he does, he becomes harmless. He is a bull or a bear, so as to be worthily entitled to the name, only when he is shrouded in the profoundest mystery. If the reports, evil or good, by which the market is agitated, could be traced to their real authors, their value could be at once rightly adjusted. It is because these reports cannot be traced to their real authors, but are supposed to come from impartial observers in scenes far removed from stock agitations, that they acquire weight. It was said

that Lord Shelburne, for instance, when in the English cabinet at the time of the treaty of Versailles, permitted false bad news to escape, so as to bring down the consols, which he then purchased, and suppressed true good news, for the same purpose, until the true good news got out in an exaggerated shape, when he sold out. But Lord Shelburne, be this story true or false, never appeared as either disseminating or suppressing news. Had he done so, it would have had the effect opposite to that intended; he would have been bulling instead of bearing, or bearing instead of bulling. So our own speculator in granger securities is obliged to keep concealed, for if he should appear with an order for stock in one hand and a depreciatory telegram in the other, the depreciatory telegram would operate as the strongest of puffs.

In New York, to buy "long" is used as convertible with "to bull;" to sell "short" is used as convertible with "to bear."

"A short sale," according to testimony taken in New York in 1866, is a sale before purchase, "with a view of buying in when the market falls, at a lower price than we have sold."³

"Contango" is an English slang term which covers a stock operation not without its complications. It means, so Mr. Crump tells us, a continuation charge, which is assessed under the following circumstances: Two accounts are taken in the English Stock Exchange every month, one at the middle of the month, and one at the end. A bull operator has 100 shares of the Northwestern Railroad open for one of these accounts. The time of settlement is at hand, but the market price is not yet such as to enable him to make his intended profits: If he can carry the stock another fortnight, he thinks he will be safe. For this, however, he has to pay; in other words, he must pay the parties with whom he deals a bonus or percentage for the privilege of continuing a bull of the stock, instead of taking the stock at the market price. The "contango rate," it need scarcely be said, varies with the position of the jobber who is to furnish the stock. It may be

³ Knowlton v. Fitch, 48 Barb. 594. See also s. c. 52 N. Y. 288.

that the condition of the market is such as to make it difficult for him to deliver the stock to a purchaser at the time when the stock, by the terms of its purchase, is to be delivered. If so, instead of requiring to be paid for the contango, he will be glad to pay a consideration to be excused from delivering the stock for two additional weeks. On the other hand, the stock may be flush in the market, and the jobber may want to realize cash, especially if he has the stock on hand. In such case the jobber is entitled to a contango premium, which in England ranges from 1-4 per cent. to 1 per cent. for the two weeks, but in this country ranges higher. The practice is for the jobber indubitably beneficial. It enables him to make a premium on an operation by which he can protect himself from risk. It is otherwise, however, with the speculator, who is thus often not merely shorn of his profits, but is subjected, even when nominally successful, to an actual loss.

Let us suppose, for instance, a speculator to buy 50 shares of Lake Shore stock at \$50 per share, contracting thereby to pay \$2500 on the settling day. His contango commissions to the broker we may put at \$40. This, with the selling commission on the stock, absorbs, taking stock operations in the long run, the balance he would make ordinarily from the operation, supposing it to be effective. Contango commissions are among the chief sources of profit which a broker has in his business, and they come exclusively from the speculator. To speculate is to submit to these commissions, which must eventually, if the speculations be sufficiently protracted, exhaust the speculator.

Gwendolin at the gambling table, stimulated by good luck to encounter bad luck, is an illustration of the principle on which contango commissions are so seductive. A market is rising, and a speculator, who has bought but not yet paid for his stock, exclaims, "Why must I close the transaction now, when by waiting another fortnight I may make twice as much as I am now making, and this without paying a cent except my contango?" So he bargains for another fortnight, and pays his commission. He may succeed in this isolated

operation, but it is obvious that on the long run he must fail.

"Backwardation" is the reverse of contango. A contango operates forwards; backwardation, as the name implies, operates backwards. Our speculator, for instance, instead of buying, is selling. His object is, not to get Lake Shore for his money, but to get money for his Lake Shore. But this does not express the whole transaction. He has sold on time, and on settlement-day he has to produce the stock. This, however, may not be convenient to him, for he may not have the stock to produce. He may stave off the crisis, however, to the next settlement-day, by paying backwardation to his broker; *i. e.*, the expense of obtaining the stock elsewhere. In the meantime he goes on bearing the market with what ability he can, and it may be that he may succeed. The market may be gorged with Lake Shore; it may be rapidly falling; and what he gets 60 cents for, he may be able to purchase, in time for its delivery, for 50 cents. In such case backwardation may not cost him much. But he may be overtaken by a contrary fortune. Lake Shore may rise; his efforts at bearing it may be discovered, and may run the stock up instead of down; each additional hour may witness a higher price; and though he may deem it politic to risk a further rise by postponing the settlement two weeks, yet he must pay a heavy backwardation for the opportunity. By protracted backwardation, as well as by protracted contango, ruin is inevitable.

In New York, where, as we are told, the "put" and "call" contracts are determinable in thirty days, "renewals," as they are called, are granted (as a matter of favor, though not as a right,) for an additional thirty days, at a cost usually of \$125 for a double privilege, or \$75 for a put or call—for each one hundred shares. To these renewals apply in full force all the objections we have noticed as bearing on contangos and backwardations.

"Options" form a mode of speculation which has three forms. First comes "put and call," "which means to take or deliver stock at a fixed price at a future date, for which a certain sum is to be paid on the day the bargain is entered

into." For instance, I agree to take 100 shares of Lake Shore at 50, payable to-day, the shares to be delivered to me in ten days. "Put" "means the option of delivering a specified amount of stock at a fixed date, the price and the day of delivery being agreed upon at the time the money is paid." The "call," on the other hand, is the opposite of the "put."⁴ "It is the option of claiming a specified amount of stock at a future fixed date, such date, together with the price, to be agreed upon at the time the option money is paid. The sum of money that is paid for options fluctuates in sympathy with the changes in the value of public securities, and also depends upon the amount of business doing. An option may be done from day to day, or from account to account. The option money is paid by the principal to the broker at the time the transaction is effected. When the option expires, the person who has paid the money declares whether he buys, sells or does nothing."⁵

Mr. Crump tells us that the almost unbroken experience of the stock exchange is that option money once paid is hardly ever recovered. Independently of other difficulties in the way of such recovery, we must keep in mind the well-known difficulty of drawing back from a gambling speculation when once begun. I either am winning or losing. If winning, I am in a run of luck which it would be folly in me to desert. If losing, luck will at some time turn, and by doubling my stakes I am sure to come out successful in the end. Such is the reasoning; but with stock speculating, as with all other forms of gambling, it is the banker or broker alone who necessarily wins. We may suppose for instance, \$1,000,000 to be in the hands of a body of speculators, some bulls and some bears. For a month they are respectively employed in bulling and bearing, and the commissions received by the brokers in these sales to and fro amount to \$10,000. At the end of the month the brokers are \$10,000 richer, and the speculators are \$10,000 poorer. At the end of one hun-

⁴ As to "calls," see *Riston v. Godet*, 7 Albany L. J. 27; *Smith v. Bouvier*, 70 Penn. St. 329.

⁵ Crump, p. 25.

dred months the brokers will have had the entire million, and the speculators will have nothing left.

A "put," according to the New York practice, is a contract to *purchase from* the bearer, and is generally expressed in the following printed form :

For value received the bearer may deliver to the undersigned one hundred shares of the _____ company, at _____ per cent. of its par value, at any time within thirty days from date. The undersigned is entitled to all dividends, or extra dividends, declared during the time.

Expires _____ 187 _____ (Signed)

A "call" is, by the same practice, a contract to *sell to* the bearer, and is made out as follows :

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For value received, the bearer may call upon the undersigned for _____ shares of the stock of the _____ company, at _____ per cent. of its par value, at any time within thirty days from date. The bearer is entitled to all dividends, or extra dividends, declared during the time.

Expires _____ 187 _____ (Signed)

A "double privilege" is a combination of a put and a call in one contract ; that is, it is an agreement *either* to sell to, *or* to purchase from, the bearer, the stock in question. The form is as follows :

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For value received, the bearer may call on the undersigned for _____ shares of _____, at _____ per cent. of its par value, at any time within thirty (30) days from date.

Or the bearer may, at his option, *deliver* the same to the undersigned, at _____ per cent. of its par value, at any time within the period named.

All dividends, or extra dividends, declared during the time, are to go with the stock in either case, and this instrument is to be surrendered upon the stock being either called or delivered.

Expires _____ 187 _____ (Signed)

We are further informed that the practice is for "puts" to be issued somewhat *below*, and "calls" somewhat *above* the market price. The same is true of double privileges, which are, however, issued closer to the market than puts or calls singly. These distances are regarded as part of the consideration of the contract, and vary from day to day, according to the activity of the particular stock and state of the market. The average distance is reported to be 1 to 2 1-2 per cent. on an ordinary market.

To "put up a margin" is to place with the broker a sum to secure him from loss when dealing for his principal. The rule is for customers buying and calling on a margin to deposit with the broker a fixed percentage, varying from 5 to 10 per cent. of the security.

"Straddles," according to Mr. Crump, is an American slang rendering of the English "put and call." In the New York market, however, "straddles" are regarded simply as double privileges issued *on* the market, in place of at a distance each side of the market. They cost more in *cash* than double privileges, the difference being generally equal to the distance from the market at which the double privileges are quoted at the time.

In other respects we have much improved on English phraseology. Why a speculator, who, having engaged to deliver \$10,000 shares of Lake Shore ten days hence, finds that all the Lake Shore in the market has been bought up by other operators, so as to compel him to ruinous sacrifices, should be said to be "roasted," it is hard to see. It is not, however, hard to see why he should be said to be "cornered." Checkers is a game of which even city gamblers may retain a recollection, and cornering in checkers is an operation illustrative of cornering in stock speculation. Even Centennial themes might condescend to be used for the same purpose. Cornwallis, for instance, is gradually "cornered" in Jamestown.—Road after road is blocked. At last even escape by sea is prevented by the French fleet, and the English commander, according to his own despatches, is in a "corner" whose open sides the skill of the enemy is about to

close. When closed entirely, other metaphors may be resorted to, and the "corner," to use General Grant's famous description of General Butler's situation at one time on the Peninsula, becomes a "bottle." But in street speculations, it is never intended that the "corner," even if the unlucky operator be enticed into it, should be absolutely closed. A way is always open for him to escape; only for the use of this way he has to pay enormously.

Mr. Crump, while tacitly admitting that "corner" is a happier expression than "roast," cannot make up his mind that it is right to abandon "syndicate" for "clique," or "pool," or "ring." But "clique," is not a term used distinctively in stock operations; nor is it likely that a phrase so often applied to groupings based on sentimental and fashionable distinctions, would be extended to operations so devoid as are those of the stock market of either sentiment or fashion. "Pool" is undoubtedly a common term among us; but without any knowledge on the subject beyond that derived from the few legal investigations in which the term comes up, we should suppose that it is limited to contracts between two or more operators by which they agree, as to a particular line of operations, to divide their winnings and share their losses. A "pool" may be illegal, when it becomes so exhaustive as to control a market, and to produce a famine of any staple essential to public comfort or health. Some years ago, when it was alleged in Pennsylvania that certain great capitalists had bought up the coal mines of a particular district so as to reap immense profits, it was declared by a judge of the Supreme Court, when incidentally noticing the question in a case before that tribunal, that such a combination to hoard coal, if carried on so as to produce a coal famine, would be a conspiracy at common law. Indubitably both by Roman and English common law, contracts to carry out such combinations are void if their effect is to extort grossly excessive prices for necessary staples. But "pooling" in order to obtain reasonable profits is under no circumstances illegal; nor, however disreputable is the term, is there any line of business in which several

operators are engaged, in which "pooling," for one purpose or another, is not constantly resorted to.

To "syndicates" Mr. Crump assigns functions much less lofty than those which we have been pleased to associate with such organizations. To us syndicates are chiefly known as companies of great capitalists, foreign and domestic, who unite in taking public loans in immense blocks, and then selling in smaller parcels. An English syndicate, however, according to Mr. Crump, is "a combination of speculative capitalists which is formed either to divide a loan amongst them and unload their portions upon the public as opportunities may occur, or to 'wash' a stock up and down, getting what they can out of the unwary public during the operation." If so, this "washing," done by a combination of adroit and bold men, by which a worthless security is bolstered up by false puffs, and put upon the stock market at fictitious quotations, on purchases purely illusory, is a conspiracy at common law. The conspirators may no longer in the ameliorations of recent jurisprudence, be indictable in a criminal court. But he who by such processes fraudulently sells stock to another, is liable in an action for deceit. The only defence to such an action—and it is a defence which it is important to notice—is that the buyer was a co-conspirator with the seller. If each was a gambler, and if the buyer knew the cheat but thought that he was about to overheat and to turn the seller's fraud against himself, then the buyer is without redress.

In the London stock exchange, the middle and the end of each month are settling days. "Each fortnightly settlement," Mr. Crump tells us, "occupies three days; the first is the carrying over or contango day, the second is the name or ticket day, and the third is the day for paying the differences, or the amount of money for stock or shares to be taken off the market. The settlements in consols is monthly, and near the commencement. The extent of the business transacted in the stock markets has been very accurately measured since the establishment of the clearing house. All transactions being settled by cheques, the in-

crease in the clearing house totals on a stock exchange settling day, correctly indicates the amount of money which has passed between buyers and sellers." In Broad street, sales are made for either "cash" or "regular." "In the first case, purchases have to be settled the same day before 2.15 P. M., and in the second on the following day. Time contracts correspond to our time bargains, and have about the same conditions attaching to them with the exception that the rate of interest charged, answering to our contango, is generally 6 per cent., unless otherwise stipulated, and is not influenced by a varying standard such as our bank rate."

At common law it was never pretended that a contract to sell an article to be delivered in future was void when the seller at the time of contract did not have the article under his control. In New York, under the Revised Statutes, as originally adopted, all such sales were pronounced to be illegal.⁶ This, however, was found to produce so much inconvenience that in 1858 the provision was repealed, and the following adopted:⁷ "No contract, written or verbal, hereafter made for the purchase, sale, transfer, or delivery, of any certificate, or other evidence of debt, * * shall be void or voidable for any want of consideration, or because the vendor at the time of making such contract is not the owner or possessor of the certificate or the evidence of such debt, share or interest."

In England the only applicatory statute is that of 8 & 9 Vict. ch. 109, which provides "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which should have been deposited in the hands of any person, to abide the event on which any wager should have been made." At common law, in England, unless a wager violated public decency or morality, a

⁶ See *Frost v. Clarkson*, 7 Cow. 24.

⁷ See 2 Rev. Stats. 6th Ed. 1005.

suit on it could be sustained.⁸ In this country, however, this has been doubted, and suits on wagers have been dismissed.⁹

We have just noticed that at common law the fact that the speculator who orders certain stocks to be sold for him does not at the time of contract own the stock sold, does not vitiate the contract. An interesting illustration of this principle occurs in a Pennsylvania case which was decided in 1872.¹⁰ It was held by the supreme court, as is stated in opinion of Chief Justice Thompson, that when the contract is that the stock dealt for is not to be delivered *in specie*, but the broker and the speculator are to settle by paying the difference to each other at the close of the transaction, then such contract is invalid as a gambling transaction. It was, on the other hand, held that where the speculation is founded upon a real sale and purchase of stocks, and the stocks are actually sold, bought and delivered, then the transaction is one which the courts will sustain. When the seller not only does not own the stock, but does not intend to intermediately buy the stock for the purpose of delivering it, then the transaction is obnoxious to the statutes prohibiting betting and gambling; and so by the same court it was previously held.¹¹ But even in the opinion in which this was ruled, it was admitted that the "*bona fide* purchase of stocks no doubt can be conducted lawfully, and can be so conducted without in the least trenching on the gambler's province. * * *Bona fide* time contracts about stocks and other personal property seem from custom to be necessary in our country, and although such transactions may be greatly affected by the rise and fall of the market, yet they are not for this reason obnoxious to the objections to transactions we are now considering; for in such case the losing party has something for his money, but the losing gambler nothing." It was therefore ultimately held that when a transaction is *bona fide*, and not merely a form to cover gambling transactions, (which is for the jury to

⁸ See *Dalby v. Assurance Co.*, 15 C. B. 365.

⁹ See Mr. Perkins' note to Benjamin on Sales, § 542.

¹⁰ *Smith v. Bouvier*, 70 Penn. St. 329.

¹¹ *Brua's Appeal*, 55 Penn. St. 294.

determine,) then the fact that the party selling has not the stock under his control at the time of sale, does not make the contract illegal. The same view is held to be good at common law in New York.¹²

Against risk of loss the broker is abundantly fortified. He may, on buying stocks at his principal's order, take an assignment of the stock in his own name, as security for the amount advanced; and he may hold the stock until reimbursed.¹³ He may receive deposits from a stock-gambling principal, but no suit lies against him, as we have seen,¹⁴ to recover back the deposit, because the law will not aid in enforcing any illegal contract. He is entitled to require, and does always in practice require, as we have already seen, a margin from his principal to secure him from loss. When, however, this margin is not sufficient to enable stock in the broker's hands to be held without loss, the broker is not at liberty to sell the stock without giving the owner an opportunity to increase his margin and hold the stock for a rise.¹⁵ Nor will the courts sustain a custom by which brokers can use, by hypothecation, securities deposited with them as margin.¹⁶ An order, however, to a broker to buy stock, deliverable at any time, at buyer's option, in sixty days, will not, even though sustained by custom, authorize the broker to buy the stock himself at thirty days, and deliver it to his customer at the end of sixty days at an increased price and interest, besides the usual commission.¹⁷

It may be worth while to glance more in detail at the three groups, individual members of which appear, directly or indirectly, in all cases of stock litigation. The customers come first, and customers fall into two classes: the capitalist seeking investments, and the speculator. These classes run into

¹² *Frost v. Clarkson*, 7 Cow. 24.

¹³ *Horton v. Morgan*, 19 N. Y. 170.

¹⁴ *Staples v. Gould*, 9 N. Y. 520.

¹⁵ *Ritter v. Cushman*, 7 Robt. N. Y. 294; 35 How. Pr. 284. See *White v. Smith*, 6 Lans. 5.

¹⁶ *Lawrence v. Maxwell*, 33 N. Y. 19. See *Baker v. Drake*, 53 N. Y. 211; *White v. Smith*, 54 N. Y. 522.

¹⁷ *Day v. Holmes*, 103 Mass. 306.

each other: the capitalist is always open to the temptation to speculate; the speculator always looks forward to becoming a capitalist. With the speculator, however, when treating of customers, we shall exclusively have to do; and the speculator presents himself to us in many interesting legal relations. However knowing he may be, he can never, except in rare contingencies, know as much as others of whom at any time he may become the dupe. We do not speak of the fact that in the long run he must succumb to the broker to whom alone the profits of speculations ultimately belong. What, however, should never be forgotten, is that there is no stock in the market as to which the ordinary investor is not open to be imposed on by others who are possessed of secrets of which he is not advised. We have already noticed the suspicions afloat as to Lord Shelburne's speculations. It is far more agreeable to speak of the delinquencies of English statesmen than of our own; and we may therefore notice, as a further illustration of peculation, the operations of Lord Bute. He came to London so poor as to be obliged to avail himself of the coaches of his friends to be carried from house to house; he left office one of the richest men of his times. While in office had occurred the peace of Fontainebleau. Prior to that peace, stocks vibrated madly; if peace seemed probable, consols went up; if war was to continue, and especially under such a minister as Bute, consols dropped. Never was there a government which seemed so irresolute. At one time it was intimated that war counsels prevailed; and when prices fell, it was noticed that those in the confidence of the government were heavy purchasers. Then, on authentic rumors of peace, prices went up, and those in the secret had an opportunity to sell. So was it with regard to important public intelligence. No item of such intelligence, it was whispered, was suffered to transpire, until it had been duly used to benefit the minister's confidential friends. How far a similar practice existed in our own civil war, it is impossible to say. All we know is, that officers of the government were possessed, time after time, of secrets of immense value to speculators, and that speculators, in the confidence of these

very officers, made great fortunes at the time these secrets were likely to be effective.

The telegraph has now put parties on a level, so far as concerns such great public events as the results of battles; but it is otherwise as to political *coups d'état*, and as to the operations of our great business corporations. The President of the United States, for instance, or the Secretary of the Treasury, has power, by a stroke of the pen, to produce a temporary famine or a temporary glut of currency. On the famous Black Friday, when the best stocks could not find purchasers, an operator who was in the secrets of the government could have made immense sums by buying at the lowest figure, and selling after the intervention of the executive was made known. We have in the law reports two cases of the making or losing of sums of sixty and eighty thousand dollars by means of information or lack of information as to the operations of a particular corporation; how colossal may have been the fortunes which might have been heaped up by a knowledge of what the government intended to do on a crisis such as that of Black Friday. Smaller, indeed, are the profits to be made by being in the secrets of a great business corporation; but the comparative smallness of the gains is made up by their frequency. A railroad company like the Boston & Albany, for instance, intends to lease a road heretofore unproductive. Even supposing the directors of the former road do not buy up the latter for themselves, yet the secret is apt to pass to the directors' friends, and the directors' friends benefit by the leasing. Or the board of a trunk road determines to guarantee certain bonds issued by a company in aid of a new enterprise, and these bonds, by means of this guaranty, are raised to par. Yet before the guaranty is made public, those in the secret have the option of buying up the bonds at a discount so great as to make a profit of from twenty to forty per cent. on the nominal value of the bonds. What is thus made by the speculator in the secret, is lost by the speculator out of the secret. The speculator out of the secret, if he operates, must do so with the certainty of being overreached, in the long run, by those better advised.

What legal remedy has the speculator if he loses his money by operations such as those just noticed? The first reply to this question is the counter-question, who is the unlucky speculator to sue? The broker whom he employs? But the broker, if he acts simply as such, is the mere agent of the speculator. The speculator can no more sue the broker for obeying his orders than he could sue himself. Can he sue the party who buys or sells the stock which our speculator sells or buys? But such party, dealing in open market, and making use of no deceit in his negotiation, cannot be made responsible if he should sell stock which falls in value, or buys stock which rises in value. And even supposing our speculator finds some one to sue, is he himself a person who can maintain suit? Can a person who buys a lottery ticket sue the lottery agents in case his ticket does not draw a prize? Can a person who has an opportunity of discovering the value of an investment sue for damages imputable to his own neglect, or to his over-confidence in those whose advice he takes? The last is an interesting question which will presently be more fully considered.

The "tipper," to whom we are next introduced, in surveying the *dramatis personæ* of many stock suits, presents himself to us in so many variations that he must be examined in some detail. A "tipper," to take Mr. Crump's definition, is a person of weight, who advises others in the purchase of stocks. But under this general description lurk several distinct species. The "tipper" may be an honorable, kindly man, sincerely desirous of benefitting his friends. He has been very successful in his business operations. The flood-tide of speculation which culminated in 1872 produced multitudes of successful business men whose luck was largely attributable to the growing inflation of the currency, and to the stimulus the war afforded to various branches of industry, but whose sagacity, energy, and courage did good service to the country as well as to themselves. With such men, unbroken success, under an auspicious sky, produces a self-confidence which undertakes gigantic speculations under skies anything but auspicious. A series of railroads have

been built, for instance, by Mr. A., and his associates, in the following way: They buy, for a song, the stock of a road which is as yet scarcely surveyed. They issue bonds sufficient to build the road, which bonds they sell to their friends as "perfectly good," these bonds, at 7 or 8 per cent., being usually disposed of to the first purchasers at 90 cents on the dollar. The road is put in running order and it makes enough to pay the interest of the bonds; or if it does not, the bonds are guaranteed by one of the great trunk lines. The friends who take the bonds get all they want for their money; and they do not grudge Mr. A., if by the operation he obtains a block of stock for which he has paid nothing, but which is beginning to sell respectably in the market. So far so good. Mr. A., having acquired by this time perfect confidence in his stars, attempts a Moscow. It may be the Moscow of the Northern Pacific; it may be one of the minor Moscovs which represent the almost innumerable roads, built by bondholders in the last few years, from which the bondholders now obtain nothing. The Moscow is built, either in whole or in part, by those who put confidence in Mr. A. In many cases he has not sought their confidence, but they have sought his. In the Northern Pacific, it is true, we have to complain of the exceptionable way in which the bonds were put on the market; Mr. Cooke's great name and prior successes being used by agents to influence obscure and ignorant small capitalists, in remote villages, and the press being improperly subsidized to influence those who have no other advisers than the press. But the "tippers," generally speaking, whom we now consider, took no such course. They advised only those who applied to them for advice and they gave advice in entire good faith, and with an honest confidence in success. Had they disclosed to those who consulted them all the facts they would be free from reproach. Had they said, "we own this road; we will make an immense fortune if it succeeds; the bonds we sell you are to build the road; *your* money is to build it, not *ours*; yours is all the risk of stockholders, without their great contingent profits,"—had the purchasers of the bonds been told this, and nevertheless

bought the bonds, then they would have no right to complain if the speculation failed. They could not say, "we relied on Mr. A.'s advice, as a disinterested adviser; and now we find that he was not a disinterested adviser, but was using our money, without any risk to himself, to further a speculation of great risk to us."

But supposing no such disclosure of his secret interests is made by Mr. A. to his friends who consult him as to investments, is he liable to them in case these investments fail? In answering this question, we find that those thus dealing with Mr. A. fall into two classes, the friend, and the *cestui que trust*. Can a capitalist, capable of business, maintain a suit against a "tipper," because the "tipper," in giving advice, conceals facts which make him a partial if not incompetent adviser? Now first have we to observe that a person capable of business is himself guilty of negligence if he omits to make due enquiries as to his purchases, and relies exclusively on the judgment of another. "*Caveat emptor*" is the rule, and a wise rule, however harsh. It is important for the community that no man, capable of opening his eyes in business, should shut them. It is better for each individual that he should exercise his own faculties, and not rely on those of others. If by each capitalist this scrutiny had been applied in the last few years, not only would we have had comparatively few breaches of business faith, but we would have been spared most of our great commercial disasters. And independently of this view, we must remember that no one has a right to expect disinterested advice from another, if the object of the advice be gains much above the market value. A "tipper," for instance, tells, when consulted, of an investment that will produce fifteen or twenty per cent. interest without risk. "But why," is the natural enquiry which would arise from an ordinarily cautious breast, "do you not take the investment yourself, or put it upon the market, obtaining for it a premium?" The largeness of the profits is sufficient notice, in law, to put a cautious investor on his guard; and an incautious investor must take the consequences of his own folly. It is otherwise where there is a fraudulent misstate-

ment calculated to deceive an ordinarily prudent man. In such case he has an action of deceit against the "tipper." But if there be no such fraudulent misstatement, the business investor cannot complain because, from his over-trust in another, he assigned to that other duties he should have assumed himself.

Far different is it when the "tipper" stands in the relation of trustee or agent to the person for whom the investment is made. In such case we must take into view two leading principles of law. The first is that an agent is bound to scrupulous good faith towards his principal, and is liable in damages for losses occurring to the principal from any failure in such good faith. The line between a friend giving advice and an agent, is well marked, both in the Roman law and in our own. The friend, merely advising, is not liable in damages for advice which is not fraudulent. The agent, whether he be paid or not, is liable for mere suppressions of fact, if the facts so suppressed show bad faith to his principal. He receives from his principal, for instance, money to invest. He invests this money in a speculation in which the risks are his principal's, while success will bring large profits to himself. In such case for him so to invest, without advising his principal, is a breach of good faith which makes him pecuniarily liable to his principal for the losses the latter incurs. He must pay these damages as a penalty for his bad faith. And by the second of the rules to which we have just referred, he must pay, because a trustee who speculates with his client's funds must make good the latter's losses, and pay over to him whatever profits the speculation may have produced. This is one of the great safeguards of society, for only by the stern application of this principle can the property of the dependent be protected, and the community saved from multitudes of disastrous and dishonorable speculations.

What has just been said applies with peculiar force to the broker who undertakes to "tip" for his principals, or, in other words, to advise them as to their investments. We have already discussed the tendency of the courts to relieve the broker from the ordinary limitations of agency, by viewing

him as in some relations agent for both buyer and seller, and by treating his memoranda, and the bought and sold notes he gives buyer and seller, as not only taking the sale out of the statute of frauds, but as creating obligations on which either party can sue. Again must we call attention to the fact that this expansion of the law of agency confers on the broker anomalous and almost absolute powers; and these powers are fortified by the security which the decisions we have noticed permit the broker to insist on against his principal by means of margins. We have also seen that the attempts to limit speculation, by prohibiting sales on time when the seller has not the stock on hand at the contract, have failed; and that the law is that no stock contract is illegal which is not obnoxious to the statutes against gambling and wagering. If the great powers thus given to brokers are to be maintained, then it is necessary for the safety of the community that the office of the broker, so far as concerns stock speculations, should be strictly defined, and the responsibilities belonging to his fiduciary position should be resolutely imposed. If a broker is to be an agent with such great powers, then he must be subjected to at least all an agent's ordinary responsibilities. He must strip himself of all interest in the stocks as to which as agent he is invited to exercise discretionary powers; and if he exercises such discretionary powers as to stocks in which he is interested, then he must pay the losses his principal incurs by the transaction. In any view he must remember that his duty is to obey instructions, and not to advise as to investments; and that for him to unite the broker's position with that of the confidential friend, exposes him to damages incurred by any failure on his part to communicate to his principal all the facts. The country has suffered enough already from stock gambling. It has suffered by the ruin of multitudes of innocent and dependent families, whose means have been swamped, through the cupidity of their agents, in enterprises which never would have been undertaken if it had not been that in such speculations the agents expected to reap large profits, while the principal alone was exposed to loss.

The country has suffered also, by the same process, in the damage done to enterprises which are meritorious, the bad dragging down the good into a common ruin. The country has preëminently suffered by the disgrace to its credit, and to the distrust, which it must itself share, attachable to the operations of some of its most trusted business men. Business laxity and political laxity have coöperated to destroy confidence of man in man; and to the loss of this confidence our present stagnation is due. Money would flow freely if the owner of money knew whom to trust. The courts have their own part to perform in restoring this confidence. To the courts is attributable the vast expansion of the power of brokers which the last few years have noticed. Brokers, as matters now stand, can, by the stroke of their pens, bind their principals to any amount; a broker can represent both parties; a broker has the key to a market at once the most fascinating and the most fatal. Stock speculation in the long run, while it necessarily enriches the broker, by the same necessity impoverishes the speculator. If the broker, in conducting speculations for his principal, is to have enormous power, it is proper that he should be subjected to enormous responsibilities. He must be made to feel that if, when occupying this fiduciary position, or wielding these vast powers, he acts on his own account, he acts at his own risk. He must be taught that for one in his position to advise, is to guarantee. He must learn also that the state regards stock-gambling as an evil thing, and that the broker who leads clients into stock-gambling must show a clear case of complicity on their part if he would escape paying their losses. He must discover that to him is preëminently applicable the fundamental principle of trusts, that a trustee who speculates with a client's funds must pay all gains to the client, and bear all losses himself.

FRANCIS WHARTON.

CAMBRIDGE, MASS.

V. *NOLLE PROSEQUI*.

"A *nolle prosequi*," it is said in Tidd's Practice, "is an acknowledgment or agreement by the plaintiff, that he will not further prosecute his suit, as to the whole or a part of the cause of action ; or, where there are several defendants, against some or one of them."¹

It is not proposed, in this article, to discuss the technical *nolle prosequi* in civil causes, but in criminal.² In substance, it is the same in both ; but, as there may be minor differences, this article will be less likely to mislead if kept pretty distinctly within the bounds of the criminal law.

The attention of the profession throughout the country was directed to this subject, by the entering, not long after the termination of the great suit of Tilton v. Beecher, of a *nolle prosequi* to an indictment for libel which had been procured by Beecher against Moulton, Tilton's principal witness, in face of the protest of Moulton who demanded to be tried. It seems that the grand jury had been induced to find the indictment for the purpose, as the sequel shows, not of trying him, but of placing him under a cloud, to impair his credit while testifying in a civil cause. That cause occupied six months in the trial, the proceedings were published all over the country ; and, during almost this entire period, Moulton, who was permitted to say nothing except in exact response to questions put to him while he sat in the witness chair, in a cause in which he had no interest and over which he had no control, was held up, by the able counsel of the party against whom he was called, and by half the news-

¹ 2 Tidd Pr. 735.

² See, as to the doctrine in civil causes, Tidd's Prac. *ut sup.*; the notes to Salmon v. Smith, 1 Saund. 5th Ed. 206 ; Minor v. Mechanics' Bank, 1 Pet. 46, 73, *et seq.*

papers of the land, as a perjured scoundrel. But a heavier blow fell when his wife was required to testify, and she, too, was by Beecher and his helpers and adherents proclaimed to the country as a perjurer. The civil trial being ended, Moulton determined to have now his turn; the indictment which had hung over him to discredit him should be tried, and then it would be decided who it was that was perjured. But Beecher and the district attorney were too much for him; the latter, under the wing of the former, in the face of Moulton's protest, entered a *nolle prosequi*; and so, it was by outside people supposed, ended an indictment which had fully accomplished its mission. Thus Moulton appears to have understood it; and, bent on vindicating himself and wife, he brought a suit against Beecher for malicious prosecution in swearing out the indictment. To this suit Beecher demurred, on the ground that the *nolle prosequi* did not end the prosecution. Hence arose the question, What, in the criminal law, is a *nolle prosequi*? The court, in the first instance, sustained the demurrer; it has been argued on appeal, and, while I write, the decision has not been pronounced. But there lies a further appeal to the Court of Appeals; and there, I presume, the question will go, whatever be the present determination.

I do not deem it decorous or proper to argue before even the legal public a question of law which is pending in court. That question—namely, whether, under the circumstances, an action for malicious prosecution can be maintained on the entry of this *nolle prosequi*—does not lie within the scope of this article. On that question, I have taken care to have no opinion, by avoiding any looking into the authorities relating to it. Whatever the law is the Court of Appeals will doubtless declare it to be; and, if compelled to sustain the demurrer, the judges, with heavy hearts, winning the sympathy of the profession throughout the country, will pronounce the judgment rendering indelible as foul a blot as was ever cast upon the administration of justice, even in the worst of times, under the worst of governments.

As I shall speak of the Beecher controversy again before

this article closes, I wish to make the further preliminary statement, that, on the merits of it, that is, whether Moulton and his wife, Tilton, and perhaps some others are guilty of perjury, or whether the perjury is on the other side,—I have no opinion to express in this article, and none which any reader will have a right to infer; especially none adverse to Beecher. If, on the question of *nolle prosequi*, involving, thus far, the forbidding of Moulton to try, in a cause which he can manage, whether or not he and his wife are guilty of the perjury charged on them by Beecher in a cause which Beecher managed, my sympathies are with the layman; still, on the other hand, if the layman had the preacher “down,” in like manner, my sympathies would be with him; and so would be those of the entire legal profession.

A newspaper report before me of the hearing on demurrer at general term quotes Shearman, Beecher’s lawyer, as saying: “It is quite clear that there is another remedy of a more efficient character; for a malicious prosecution cannot be sustained without perjury, and for perjury there is an unquestionable and effective remedy in the way of criminal prosecution.” Now, if Shearman really said this, it shows him to be, what undoubtedly he is, a most careful and reliable counselor. The observation turns attention away from the real hardships of the case, while it does not in the least endanger his client. An indictment in behalf of Moulton against Beecher in the hands of the prosecuting officer who *nol. prossed*, under Beecher’s wing, the latter’s indictment against Moulton! He could kill it in the embryo; or, if he chose not that, he could stop it with his *nolle prosequi*; or, if he was after still higher game, he could so conduct the trial as to make a verdict for the defendant sure. The “City of Churches” runs its criminal courts in the interests of religion—it protects the godly. When Beecher requested, it indicted, not only Moulton, but Tilton. Yet in vain did Tilton appear in court and demand a trial. And when that indictment also had served its purpose, the blessed *nolle prosequi* appeared, and laid it quietly to sleep. Had Shearman said that the question could be settled by a fresh indictment

against Moulton, the prosecuting officer to produce *Mrs. Tilton as a witness*, or by a civil suit by Beecher against Moulton, the plaintiff producing Mrs. Tilton as a witness, *whereby all the evidence, whether against Beecher or Mrs. Tilton*, would be pertinent to the issue, and admissible in a trial at law, he would have shown himself a bad counselor if he believed his client to be guilty, but a better one than Beecher has ever yet had if he believed him innocent.

I will explain the last observation for the benefit of any non-professional reader into whose hands this article may casually fall. The law does not doubt, any more than the common understanding of mankind does, that, if Beecher is guilty of the crime charged, Mrs. Tilton is guilty also; or, if the one is innocent, so is the other. But in a controversy to which Mrs. Tilton is not a party, it will not admit such evidence as her confessions of guilt against the party denying it, unless some foundation for the admission is laid; because, if it allowed such a rule, the rights of parties might be confessed away by third persons. But, if the people are a party, as in the case of an indictment, or if Beecher is a party in a civil suit, this party may produce her as a witness, and then this evidence against her may be introduced by way of discrediting her. And such a rule is right; because, among other reasons, one who introduces a witness thereby vouches for the witness' credibility. In the *Tilton v. Beecher* case, the law was such that Mrs. Tilton could not be a witness without consent. Beecher testified, in substance, that she was a good woman, and truthful; but that was not the sort of endorsement required as foundation for admitting evidence of her confessions, if such there were. For that purpose, *Beecher must produce her as a witness*. Tilton consented that he should do so. Beecher refused. The significance of Tilton's offer was that he wished a trial of the whole case then and there. Beecher's refusal was a sort of informal *nolle prosequi* to any such enquiry. Ever since that time, Moulton, by the aid of the best counsel he could procure, has been endeavoring to devise some method whereby, for the vindication of himself and wife, he could compel Beecher

to a trial of the whole case. As the law is, Beecher has at all times had it in his power to compel the fullest judicial investigation, to produce all his own evidence, and require his pursuers to produce all of theirs. To prevent this on his side, and to force it upon him on the other side, has been the "tug of war" from the first to the last. I do not know how the controversy will end; but, for the present, and for anything which I can discern beyond, the preacher is master of the situation. If his demurrer to Moulton's suit is finally overruled, so as to permit the trial to go on, can Moulton so manage the suit as to force Beecher to let in all the evidence? The development of this question will be interesting.

But I hasten to explain the law of *nolle prosequi* in criminal causes.

In all judicial proceedings, there must be somewhere a power to stop the machinery of the court, if, for any reason, it seems best that the cause should not proceed to its conclusion. In the criminal law, this power is, in England, vested in the attorney-general; and the instrument for its exercise is a *nolle prosequi*. The applicant for it is commonly the defendant; and formerly it seems to have been thought that only on such application and notice to the prosecutor, and a hearing on the question, could the fiat be issued. But, though such a course is commended, still, in point of law, the power lies completely in the hands of this high officer of the crown; and no other person, official or unofficial, no party, not even the court, can prevent its exercise.³ Neither, on the other hand, can the clerk of the crown,⁴ or the attorney who appears for a private prosecutor,⁵ or any other person, enter it, without authority from the attorney-general.⁶

In England, it should be remembered, the crown has no local prosecuting officers, as we have in our states. There, almost all prosecutions for crime are conducted by private

³ Rex v. Stratton, 1 Doug. 239; Reg. v. Allen, 1 B. & S. 850.

⁴ Rex v. Cranmer, 1 Ld. Ryam. 721. 12 Mod. 647.

⁵ Reg. v. Dunn, 1 Car. & K. 730. The same in this country, Commonwealth v. Dulany, 1 Cranch, C. C. 82.

⁶ O'Connell v. Reg., 11 Cl. & F. 155.

prosecutors; here, with very few exceptions, they are conducted by local attorneys for the state, called county attorneys, district attorneys, or by some other name of a like sort. And the doctrine which generally prevails in our country is, that the attorney who, in the employ of the state, but not of a private prosecutor, conducts a cause, can, at his pleasure, and without any leave of court, or consent of parties, enter a *nolle prosequi* the same as the attorney-general may in England.⁷ A further doctrine, not quite so general, but still the better doctrine in principle, is, that the court will not even advise him concerning the exercise of this power.⁸ It is a power essentially judicial, to be put forth, not in whim, but in sound discretion for the public good.

The reason why the better doctrine puts the power of *nolle prosequi* exclusively into the hands of the state's attorney is twofold: first, it is the English doctrine, inherited, therefore, by us; secondly, the state's attorney is the officer who, with us, is appointed to represent the state in a criminal case; and the state, whose representative he is, should properly have the same power over a criminal cause which the private party has over a civil one.

But in New York a statute requires the concurrence of the court when the attorney for the people enters a *nolle prosequi*.⁹ And in some of the other states, either by statute or judicial construction, the same rule prevails; while in still other states the state's attorney, by a sort of custom, consults the court; in others he acts on his own responsibility, but the court claims the right to control him if it chooses, and in some it is not plain what is the strict law.¹⁰ The reader can

⁷ Commonwealth v. Smith, 98 Mass. 10; Commonwealth v. Kimball, 7 Gray, 328; United States v. Watson, 7 Blatch. 60; Reynolds v. The State, 3 Kelly, 53 (as to which see Statham v. The State, 41 Ga. 507); The State v. Smith, 49 N. H. 155; The State v. McLane, 31 Texas, 260; The State v. McKee, 1 Bailey, 651.

⁸ Commonwealth v. Wheeler, 2 Mass. 172; Agnew v. Cumberland, 12 S. & R. 94.

⁹ People v. McLeod, 1 Hill, N. Y. 377, 405.

¹⁰ Anonymous, 1 Va. Cas. 139; The State v. Moody, 69 N. C. 529; The State v. Thompson, 3 Hawks, 613; *Ex parte* Donaldson, 44 Misso. 149;

ascertain how it is in his own state only by consulting its statutes and decisions.

It is not necessary that the *nolle prosequi* should be to the whole indictment. It may, by all opinions, be to a single count, or as to one or more of several defendants. Possibly there may be a state or two in which it is not permissible to divide a count, removing only a part of it by the *nolle prosequi*, while the rest stands.¹¹ But the doctrine nearly universal, if not quite so, permits any part of a count, in its nature separable from the rest, to be thus taken away, while the remainder stands.¹² It is not exactly clear on the authorities what are the limits of this doctrine; but, in reason, if the common-law rule prevails in a state, that there can be no conviction for misdemeanor on an indictment for felony, then, if one is indicted for felony, and the prosecuting officer enters his *nolle prosequi* to those aggravating circumstances which give to the transaction its felonious character, leaving so much as constitutes a misdemeanor charged against the defendant, still he cannot be convicted for the misdemeanor, but the whole proceeding fails.¹³ In Massachusetts a statute provides, that, "when a person indicted for a felony is on trial acquitted by the verdict of part of the offence charged, and

The State v. McComb, 18 Iowa, 43; Statham v. The State, 41 Ga. 507; United States v. Watson, 7 Blatch. 60; United States v. Stowell, 2 Curt. C. C. 153.

¹¹ People v. Porter, 4 Parker, 524.

¹² The State v. Merrill, 44 N. H. 624; The State v. Burke, 38 Maine, 574; The State v. Whittier, 21 Maine, 341; The State v. Bruce, 24 Maine, 71; Aaron v. The State, 39 Ala. 75; Jennings v. Commonwealth, 105 Mass. 586; Commonwealth v. Dean, 109 Mass. 349; Baker v. The State, 12 Ohio State, 214; Commonwealth v. Colton, 11 Gray, 1; Commonwealth v. Tuck, 20 Pick. 356 (a sort of leading case); United States v. Peterson, 1 Woodb. & M. 305; Rex v. Butterworth. Russ. & Ry. 520.

¹³ There are some Tennessee cases in which, after a *nol. pros.* of the felony, it was held that the whole indictment failed. Brittain v. The State, 7 Humph. 159; Grant v. The State, 2 Coldw. 216. And see People v. Porter, 4 Parker, 524. I should not like to say that the reason on which these cases proceed is the one stated in the text; still the view in the text may possibly help to reconcile them with others which hold the contrary.

convicted of the residue, such verdict may be received and recorded by the court, and thereupon the person indicted shall be adjudged guilty of the offence, if any, which appears to the court to be substantially charged by the residue of the indictment, and shall be sentenced and punished accordingly."¹⁴ Thereupon, one being indicted for rape, the prosecuting officer endorsed on the back of the indictment these words: "I will no further prosecution as to so much of this indictment as charges rape." And it was held that the defendant could be convicted of any assault connected with the rape charged, but not of a distinct assault.¹⁵ I shall speak of this general question again, in another connection, further on.

But though, according to the better doctrine, the power of *nolle prosequi* is absolute in the prosecuting officer if no statute restrains him, it, like every other, can be exercised only in conformity with the rules of the law. And the leading rule is, that the *nolle prosequi* can never be entered to the prejudice of any legal right of the defendant.¹⁶ When, therefore, a cause is on trial, the prosecuting officer cannot *nol. pros.* it—thus many of the cases in terms say—with or without the consent of the court, unless the defendant consents; because then he is entitled to demand a verdict.¹⁷ This statement of the doctrine, however, is only proximately correct. If the entry is admitted to the record while the trial is progressing, it is just as effectual as if made at any other time; and there are circumstances in which a court should and will permit it to be made then.¹⁸ Thus, if the indictment

¹⁴ Mass. Gen. Stats. ch. 172, § 16.

¹⁵ Commonwealth v. Dean, 109 Mass. 349. And see Baker v. The State, 12 Ohio State, 214.

¹⁶ Commonwealth v. Tuck, 20 Pick. 356, 365, 366.

¹⁷ United States v. Shoemaker, 2 McLean, 114; The State v. Kreps, 8 Ala. 951; Commonwealth v. Goodenough, Thatcher Crim. Cas. 132; Commonwealth v. Tuck, 20 Pick. 356; Commonwealth v. Kimball, 7 Gray, 328; The State v. Smith, 49 N. H. 155; Durham v. The State, 9 Ga. 306; Newsom v. The State, 2 Kelly, 60 (but in Georgia this is so by statute).

¹⁸ The State v. Roe, 12 Vt. 93; The State v. I. S. S., 1 Tyler, 178; Commonwealth v. Kimball, 7 Gray, 328; Commonwealth v. Seymour, 2 Brews. 567.

is found to be bad, the prosecuting officer may *nol. pros.* it during the trial, and the defendant may be afterward tried on a new and sufficient one.¹⁹ So, also, if the jury cannot agree on one of several counts, but can on the rest, the prosecuting officer may dispose of that one by his *nolle prosequi*, and take a verdict on those upon which they can agree.²⁰

The effect of a *nolle prosequi* depends on the circumstances and time of entering it. If the indictment is good, and without the consent of the defendant, it is entered after the jury are empaneled and sworn, it operates both as a discharge from the particular indictment, and as a bar to any future one for the same cause; in other words, it is equivalent to a verdict of acquittal,²¹ and the defendant is entitled to his immediate discharge.²² When entered at an earlier stage of the cause, it does not prevent the finding and prosecution to conviction of a new indictment for the same offence.²³

Chitty says: "The effect of a *nolle prosequi* when obtained, is to put the defendant 'without day;' but it does not at all operate as an acquittal, for he may be afterwards re-indicted, and even upon the same indictment fresh process may be awarded."²⁴

¹⁹ Walton v. The State, 3 Sneed, (Tenn.) 687.

²⁰ Commonwealth v. Steadman, 12 Met. 444.

²¹ Mount v. The State, 14 Ohio, 295; The State v. McKee, 1 Baile 651; United States v. Farring, 4 Cranch C. C. 465; United States v. Shoemaker, 2 McLean, 114; Reynolds v. The State, 3 Kelly, 53; Commonwealth v. Wade, 17 Pick. 395.

²² Grogan v. The State, 44 Ala. 9.

²³ United States v. Shoemaker, 2 McLean, 114; Wortham v. Commonwealth, 5 Rand. 669; Lindsay v. Commonwealth, 2 Va. Cas. 34; Ex parte Donaldson, 44 Misso. 149; The State v. Tindal, 5 Harrin (Del.) 488; The State v. Main, 31 Conn. 572.

²⁴ 1 Chit. Crim. Law, 480. The source whence Chitty and others have taken the doctrine which I have set down in italics is a dictum said to have fallen from Lord Holt, in Goddard v. Smith, 6 Mod 262. Salk. 2. If the dictum really fell from this eminent judge, it cannot impair his illustrious fame, but we have no very certain assurance that it did. Salkeld, as to his first two volumes, is a reporter of excellent rank, but what he has given us of this case is very brief. Nor should

The latter clause of this sentence is a curious illustration of the manner in which the majority of English text books, and not a few American, are made; namely, a hash of loose *dicta*, reported to have fallen from eminent judges, with disjointed points adjudged, slightly softened with a drizzle from the author's brain. The same thing is stated by some other text writers; but there is not one English decision, or any pretence of one, or of any actual English practice, even in a single instance, to sustain it; while, on the other hand, in cases which did not call for absolute adjudication, it has been in effect repudiated by the Court of Queen's Bench in England,²⁵ and the Court of Queen's Bench in Ireland.²⁶ Curiously enough, however, both the South Carolina,²⁷ and the North Carolina courts,²⁸ misled by the English text books, without looking, have apparently yielded to the strange doctrine, and it is probably law in those states; though I do not mean to say that the courts might not feel at liberty to overrule what seems to have been heretofore held. I cannot discover that in any other of our states has this doctrine been accepted; and in most of the others it has been directly or indirectly repudiated, as it ought. To allow a prosecuting officer to play fast and loose,—enter a *nolle prosequi* this term, and bring in the defendant on a *capias* next term, or next year, or a dozen years afterward,—to keep an indictment thus hanging over him eternally, without giving him power to demand a trial, but ready to pounce down upon him at any moment when he can be caught without his witnesses, or they are dead,—is as distinctly in conflict with the American jurisprudence as with the English. Even

I discredit the *dictum* solely from any distrust of 6 Mod. as an authority. At most it is but *dictum*, in which no other judge seems to have concurred, and confessedly without the support either of usage or precedent, even in a single case.

²⁵ Reg. v. Allen, 1 B. & S. 850.

²⁶ Reg. v. Mitchel, 3 Cox, C. C. 93.

²⁷ The State v. Haskett, Riley, 97, 3 Hill, S. C. 95; The State v. Howard, 15 Rich. 274.

²⁸ The State v. Thompson, 3 Hawks, 613; The State v. Thornton, 13 Ire. 256. And see The State v. McNeill, 3 Hawks, 183.

Moulton might yet be ruined if a fire should destroy the originals of Beecher's letters, and a picked dozen or two people should die.

A *nolle prosequi*, like any other entry of record, may, with the consent of the court, be withdrawn during the term, unless some intervening rights would be impaired,²⁷ but not afterward. It performs, in substance, the same office which non-suit or discontinuance does in a civil cause;²⁸ ending (in those instances where there are no intervening rights) the defendant's liability on the matter *nol. prossed*, as to the particular indictment, and no more. Thus, if this entry is made to a part of the counts and afterward the defendant appeals to a higher court, there can be no conviction in the higher court on the counts so disposed of in the tribunal below. Said Wright, C. J., in the case wherein this was held: "The right of the state to again indict or file a second information for the offences specified in the first and second counts is not denied after entering a *nolle prosequi* as to them. But there is no principle justifying the trial of the defendant upon these counts after their withdrawal in the same proceeding, or on the same information. For this proceeding these counts ceased to have any vitality, any legal existence, and to try the defendant upon them was to try him as if he were without an indictment or information."²⁹ And outside of the two Carolinas, the like doctrine is, with more or less distinctness, recognized in all the other American cases in which the question could arise.³⁰ Moreover, a *nolle prosequi* is neither a "trial"³¹ nor an "acquittal."³²

If we should admit the absurd doctrine that, after a *nolle*

²⁷ The State v. Nutting, 39 Maine, 359; Parry v. The State, 21 Tex. 746.

²⁸ The State v. Main, 31 Conn. 572.

²⁹ The State v. Shilling, 10 Iowa, 106.

³⁰ See, among others, Commonwealth v. Dowdican's Bail, 115 Mass. 133, 136; The State v. Fleming, 7 Humph. 152; Flanagan v. The State, 19 Ala. 546; Brittain v. The State, 7 Humph. 159; Grant v. The State, 2 Coldw. 216.

³¹ The State v. Branum, 23 Ark. 540.

³² United States v. Switzer, Morris, 302.

prosequi is entered to the whole indictment by the state's attorney, he can have a *capias* to bring in again the defendant and make him answer to it, this concession would destroy the effect of a *nolle prosequi* to a part; for, being already in court, he might at any moment, even during his trial, be required to answer to what had been apparently abandoned. And the proceeding itself would thus become of no avail to prosecuting officers for the purpose for which it is much employed with us. But, because the *nolle prosequi* does put an end to that to which it is applied, if, after an indictment is found, the attorney for the state discovers a misjoinder of counts or offences, or any duplicity, he enters a *nolle prosequi* to so much and such matter as, being struck out, leaves the rest good.³³

Again, after verdict and before sentence, doubts as to what the sentence should be, or whether or not a writ of error can be maintained on the record made up, or whether or not a new trial can be demanded on some of the counts, and other queries of this general sort, are sometimes set at rest by a *nolle prosequi* entered to the disturbing matter.³⁴ Or, if for any reason the state's attorney deems that the sentence which the law prescribes is too severe, he may mitigate it by his *nolle prosequi* as to a part before the sentence is rendered.³⁵ But when judgment has been awarded, the functions of the prosecuting officer are at an end, and he cannot *nol. pros.* anything then.³⁶

The practical question, as to when the *nolle prosequi* should be used, and when not, involves a wider enquiry than the legal. We have seen that it was employed to put an end to indictments against both Moulton and Tilton, after those

³³ The State v. Merrill, 44 N. H. 624; Commonwealth v. Colton, 11 Gray, 1; Commonwealth v. Cain, 102 Mass. 487.

³⁴ Commonwealth v. Jenks, 1 Gray 490; Commonwealth v. Tuck, 20 Pick. 356; United States v. Peterson, 1 Woodb. & M. 305; Commonwealth v. Briggs, 7 Pick. 177; The State v. Bruce, 24 Maine, 71; The State v. Whittier, 21 Maine, 341; Jennings v. Commonwealth, 105 Mass. 586; Commonwealth v. Wallace, 108 Mass. 12.

³⁵ The State v. Burke, 38 Maine, 574.

³⁶ Weinzorpfli v. The State, 7 Blackf. 186.

indictments had served a collateral purpose, though demanded a trial. And the injustice of this proceeding already been mentioned. But the practical question now to be considered relates, not to the justice or injustice of *nolle prosequi*, but to its adaptability to accomplish a desired object. For example, was the *nolle prosequi*, in these cases, really a measure adapted to shield the reputation of Beecher from the assaults of his accusers? And this opens a broader question, on which I wish to dilate awhile, for the benefit of the young members of our profession. Is it always wise to stop investigation, if you can, when you think your client is guilty? I put it in this way because, when we declare our client to be innocent, all agree that investigation should be open and free. Innocence courts the light; guilt, the darkness. And for an innocent man to be put, by his lawyer, playing the part of a guilty one, is, if innocence can be destroyed, sure and speedy destruction.

Let me, then, for purposes of illustration, place beside the Beecher case another in which the management was quite different. Mr. Beach, in his closing argument for Tilton, mentions some instances of fallen clergymen, and, among them, the following :

"The Rev. Joy H. Fairchild, a leading Congregationalist in Boston, after honorable service in the pulpit for many years, became involved in some difficulties with his congregation in consequence of his intercourse with its female communicants. He left Boston and was settled at Exeter, probably in consequence of these rumors, which followed him to that place. He was accused of seduction, and at a trial before a council a letter was read to the council in which Mr. Fairchild admitted that he had bound the girl by a solemn oath to deny that she ever knew him. The council were inclined and did give Mr. Fairchild the benefit of the doubt, and he was not convicted. He afterward attempted to preach in Boston, but met with no success, was thereupon charged by a paper with the crime, the offence of adultery, and he brought an action of libel against the publisher, and was defeated, on a full trial of all the circumstances, upon a

fication of the alleged libel, and upon the proofs, with some additions, substantially which were presented to the council of his brethren, and who, as the report says, gave him the benefit of their doubts."³⁷

There was one trial of this accusation against Fairchild not mentioned by Mr. Beach, and of this I wish to speak. His offence, if any, was adultery committed in Boston. For this, after his acquittal by the ecclesiastical council, and before the trial of the civil cause, he was, in Boston, indicted; adultery being, in Massachusetts, unlike New York, indictable under a statute.

The trial on this indictment came off soon after I was admitted to the bar; and, being desirous of extending my knowledge of practice, and knowing and respecting all the counsel engaged, I attended and watched it steadily and closely to the end. It was notable as being conducted in the entire absence of the *nolle prosequi*; and notable, as the reader will see, for its conclusion.

After the case was opened, Fairchild's senior counsel arose, and, in great seriousness of manner, said, in substance:

"May it please the court: Our client is a minister of the gospel; and he asks an acquittal from this heavy charge, not only by the jury here, but by the community. We come, therefore, instructed by him to make no objection, technical or otherwise, to any evidence which may be offered, or any proceeding which may be proposed against him. If, on the other side, there is any evidence, or semblance of evidence, which it is supposed ought to influence the common understandings of men, not technically admissible, we beg that it may be produced; and, if the court please, it shall be submitted to the jury."

There were no counsel who knew better how to make sharp points, and to object, than the two who conducted the defence in this cause. It occupied the court, I think, three days—it was thereabouts. Yet not an objection to a witness, to the substance of his testimony, to any question even in matter of form, to anything, fell from the lips of either of

³⁷ 3 Tilton-Beecher Trial, 844.

those lawyers during the whole trial. The case was submitted to the jury just as the shadows of evening were creeping over the city. They retired ; and, in a few minutes, returned to the crowded room with the verdict *not guilty* ! Suddenly a burst of applause arose which it was impossible to subdue. Such a moment of joy was seldom witnessed either inside or outside of a court-room. Never before or since did I see the dignity of a court of justice so completely overwhelmed and inundated by the tide of gladness. As soon as any one voice could be heard, Fairchild stood up, and, with tearful eyes, in few words, expressed his gratitude and thanks.

I am not sure of my own memory whether the subsequent civil trial was in Boston or elsewhere. It would be interesting to know whether or not Fairchild's counsel employed in it the *nolle prosequi*. The conjecture would be safe, however, that they did.

There is always an immense gain in a cause, for counsel and client to *act* as though they believed the client innocent. *Words* are of but little use. Men are judged of by their conduct, not their words. And the young lawyer should make it a rule at the outset of his career, that in no case *which* he can conduct without the *nolle prosequi*, will he employ this agency.

I do not mean that a lawyer, in the conduct of a *cause* which he deems to be righteous, should never object to any thing. To what is produced on the other side, not to enlighten, but to darken, he is required always to object. But the *nolle prosequi*, in the somewhat figurative sense in *which* I am now using the term, shuts down the gate upon testimony adapted to enlighten the understanding, and opens it wide when mist and darkness appear.

I do not think the records of our jurisprudence furnish any other case in which the *nolle prosequi* has been so prominent a feature, or employed with such consummate skill, as *this* case of Beecher. By the Beecher case I do not mean simply the cause in which Tilton was plaintiff, and which occupied the court six months in the trial, but the whole controversy as to whether or not this eminent preacher is guilty of *moral*

delinquencies with female members of his flock. Viewed thus as a whole, it may be termed "The Great Nolle Prosequi Case."

It should be remembered that there are two sorts of *nolle prosequi*: the one, of record; the other, not of record. The former is the one meant by the term, in our books of the law. The latter (I am using the term figuratively) is of much more frequent employment in legal practice, more difficult to be defined, and an "edged tool" of more danger in the hands of the practitioner. It would be pleasing to discuss it as amply as I have done the *nolle prosequi* of record; but vastly more space would be required, rendering this article unreasonably long. My purpose, in the pages which remain to me, is to point out to young lawyers some of the rocks on which they may shipwreck a cause, however just, if they follow too closely, and without nice discrimination, this "Great Nolle Prosequi Case" as a precedent; and, in connection with this, to point out circumstances in which this weapon of legal warfare should be used with special caution, or not at all.

First, then, if you are confident that your client is in the right, and so his case will bear investigation, do not at all use the *nolle prosequi*, whether of record or not of record. You are merely to conduct it in such a way as to let in the light upon it.

Again, if you believe your client in the wrong, and it is possible to avoid the *nolle prosequi*, do so. And the reason is, that, should he and you *act* on the theory of his guilt, many, who suppose he and you know how the fact is, will accept your conduct as testimony, and condemn him even without any evidence whatever. This Beecher case possessed some elements favoring the use of the *nolle prosequi*, not in most other cases. I am speaking particularly of the trial of it before the great jury of the world. After the trial of the suit brought by Tilton, one of Beecher's counsel was able to go abroad, and from foreign shores proclaim, in the ears of this whole jury of the world, that, though his counsel had conducted his case on the theory of guilt, employing the *nolle prosequi* to its utmost capacity, still in matter of fact they

believed him innocent. This device, which was good in the particular instance, you may not be able to employ in your cases. You may not be able even to go to a foreign shore until the case is decided, if at all. Or you may have for your auditors intelligent people; posted, for example, in such works as "Paley's Moral Philosophy." Let me quote a few words from a chapter the title of which I need not give: "Where no one is deceived," says this eminent philosopher and divine, "there are falsehoods which are not lies;" "which is the case in parables, fables, novels, jests, tales to create mirth, ludicrous embellishments of a story, * * * compliments in the subscription of a letter, * * * a prisoner's pleading not guilty, an advocate asserting the justice, or his belief of the justice, of his client's cause. In such instances, no confidence is destroyed, because none was reposed; no promise to speak the truth is violated, because none was given, or understood to be given."³⁸

Once more, it is to be considered, before deciding to employ the *nolle prosequi*, whether or not the surroundings will enable you to hide your real purpose. In this case of Beecher the surroundings were right, but they may not be so in the case of your client. Thus, in most instances, which may seem like this, the determining circumstances are different. It is whispered of a pious clergyman without influence, that he is too intimate with some one woman, his favorite. At once the rest of his flock take the alarm; investigation is firm and strong; from many a house he is spurned, simply because its inmates fear the talk of neighbors; and, if the clergyman is innocent, he is exceedingly fortunate should he get off without condemnation. In this Beecher case, the accusation assumed so general and wide a character, something of it was said to have been of so long standing, and he had been intimate in so many families, that each church-member feared the effect of it on his own family or the family of his friend. Hence the whole church and congregation were drawn together by a common sympathy, to make a resolute effort for self-preservation. And they were an im-

³⁸ Paley Phil. b. 3, c. 15.

mense and powerful body of people, great numbers of whom had verified the truth of the scripture declaration, that "godliness is profitable." Moreover, there were large pecuniary interests involved, in books, sermons, a newspaper, and the like. The cause of Beecher, therefore, was the cause of all the people; so that, with no lack of money, they fought for their own fair fame, and the fair fame of their friends, through him, under the guise of disinterested devotion to a man whom they knew so well as to be able to vouch for his purity. I do not say that they did not, every one of them, believe him pure. Neither does this article hold him to be anything other than what his warmest friends claim for him. At the same time, it is true that his church were defending themselves through him; and, if we call it benevolence and Christian devotion, still the path of the righteous becomes no less pleasant by being also the path of self-protection. Here, then, was immense power for managing the *nolle prosequi*, not possessed in ordinary cases.

Another thing to be considered is the peculiar practice of your own state; for the *nolle prosequi* can be effectually employed only in line with it. Thus, in most of our states, the judge at a trial not only occupies the judgment seat, but actually determines and enforces the rule of law for the guidance of the jury, not dividing in any measure his responsibilities with counsel, or permitting counsel to take turns with him in instructing them. But not so, it seems, in New York. Therefore in the Tilton v. Beecher case we have what it will require a few words to explain. Tilton was offered as a witness in his own behalf. Objections were made by Beecher's council, and the question of his admissibility was discussed at considerable length by the respective counsel. Evarts, for Beecher, called attention to the point that confessedly Mrs. Tilton was not admissible, and to the hardship of receiving his testimony and excluding hers.³⁹ But Evarts was to have another opportunity to dilate on this, in summing up for the defendant. Tracy was not. So Tracy in his opening for the defence said: "And now, gentlemen, I ask you to

³⁹ 1 Tilton-Beecher Trial, 358.

consider for a moment that Mrs. Tilton is the true defendant in this cause—she whose lips are sealed and whose hands are tied, while the battle is waging over her body. She can make no outcry, and strike no blow in her own defence. She can only weep and pray, as she has done so often already, looking for her deliverance to Almighty God and to the spirit of justice which he inspires in the hearts of men.”⁴⁰ And he proceeded to tell how pure and saintly this woman was, but now compelled by the wickedness of her husband “to tear herself from her home and from him forever.”

At the proper time in the course of the trial, the plaintiff’s counsel offered to waive any objection to the admission of Mrs. Tilton, and permit the defendant to call her. Suddenly the *nolle prosequi* fell. *The defendant’s counsel* (not the court) decided, *instantly*, that, by law, she could not be received, even with the consent of the other side; besides, there was evidence enough without hers; besides, to receive her would be “tearing to pieces the last shred of respectability and hope in the future for this family.”⁴¹

This was a sort of getting out of an unpleasant fix; but, in most other of our states, where a different practice prevails, the judge not dividing responsibilities with counsel, the following would have fallen from the bench: “Gentlemen, if you offer Mrs. Tilton, the court will decide whether or not she is admissible. Until then, the question is not before the court, and its discussion is not in order.” That would have compelled Beecher’s counsel to utter the square truth: “We decline to call her,”—a declaration in ludicrous contrast to the previous tearful declamations. But even this temporary taking of the judgment seat, which, it seems, the New York practice permits to counsel, did not quite remove the embarrassment; for, although it was thereby decided that Mrs. Tilton could not be admitted, the decision was not the court’s, but Beecher’s. Obviously, then, this taking of the judgment seat had not quite satisfied the requirements of the *nolle prosequi*. If it had been *safe* to submit the question to the ex-

⁴⁰ 2 Tilton-Beecher Trial, 9.

⁴¹ 3 Tilton-Beecher Trial, 313, 314.

cellent lawyer and fair-minded man who presided as judge, then everything would have been right. Beecher's managing lawyer would have said (still clinging to the *nolle prosequi*): "May it please Your Honor, most gladly we call that pure-minded and truthful woman, Mrs. Tilton, whose clear and simple story will dispel all doubts, vindicate her own honor, and bury in eternal shame the dastardly wretch of a husband whom she has been compelled to abandon forever. But, Your Honor, my oath of office as counselor of this court, which requires me to be true to the court as well as to my client, admonishes me first to submit to Your Honor the proposition which I conceive to be very plain, that, though the other party has waived the objection, still Your Honor is by law precluded from permitting her to be called." But the learned counsel had too much confidence in the court to deem such a proposition safe. So, reserving his final fire till his "summing up" (as it is called in New York) to the jury, he then mounted the judgment seat again, and thence instructed the ignorant twelve men in a volley of flame glorious to behold. I cannot copy it all. Is it not written in the book known as "The Tilton-Beecher Trial"? Is not every word of it there set down?⁴²

He told the jury that "the law inexorably has excluded" her! He explained that her testimony would have been of great benefit to his client, if only it were permissible in law to introduce her! The offer, moreover, had not been made until Tracy had poured forth the pathetic strain which it was now too late to recall! "Why, gentlemen, they did not want Mrs. Tilton to be a witness, but they wanted to say, after our cause was closed, under a rule of law that made it impossible for us to produce her—they wanted then to say that they would not interpose an objection. Well, gentlemen, if they thought that Mrs. Tilton's evidence would be

⁴² 3 Tilton-Beecher Trial, 807, 808. For Beach's reply on Tilton's side, see 3 Tilton-Beecher Trial, 923-925. A case which seems pertinent was cited by Mr. Beach, from which, and a single observation of the judge relating to it, the conclusion is inevitable that Mrs. Tilton's testimony would have been received had it been offered.

agreeable to them, the way for a lawyer to do, an honest, straightforward thing in that behalf, was to call her themselves, and put upon us, not an exhibitory responsibility, but an actual responsibility of saying that we objected." Aptly did this consummate master of the *nolle prosequi* exclaim, after he had thus instructed the jury, "You understand what the law is!"

But, young man, just entering on legal practice, could *you* do that? Even if the law of your state, like the New York law, permitted you to change places with the judge by turns, and instruct the jury in his stead, could you put on a bold face enough, and emphasize your words sufficiently, and not laugh, to do that? The slightest ripple of a smile, or a knowing twinkle of the eye, would utterly wreck the *nolle prosequi* under such circumstances. But if you were not in a state whose law is fashioned after the New York model, the judge would say to you: "You cannot pursue that line of observation. The question whether the impediment to Mrs. Tilton could be waived, so that she could be a witness, is one of law for the court, which you were careful that the court should not pass upon. Therefore you are not permitted now, having refused to take the judgment of the court, to appeal to the jury for help on that point."

Again, could you smooth down your face, and look grave, while saying that the counsel on the other side should themselves have proposed to call Mrs. Tilton? She had left her husband, and gone over to Beecher. And any lawyer but an "old head" would have presumed on so much knowledge in even the most verdant juror as that, in judicial proceedings, parties call witnesses who will testify in their favor, as all knew Mrs. Tilton would not in favor of her husband. But the consummate master of the *nolle prosequi* had the outside jury in mind; and, if all of this jury would not be influenced by these words, he knew that there were among them people so ignorant that they would be.

In this view, as well as in the other, the *nolle prosequi*, at this pinch of the case, was admirably managed. And at this day there are not a few people, with many claims to intelli-

gence, who exclaim: "Oh, if Mrs. Tilton only *could* have been a witness! if Beecher only *could* have been permitted to call her! But, dear me, there is no way for this good man, who so longs for a full investigation, praying day and night for one, except to be investigated by the church, that excludes no testimony, but receives all!"

Moreover, in most of our states, other than New York, counsel in closing to the jury are permitted to argue only upon the evidence. But in this state, it seems, they may say almost any thing. Now, in the Tilton v. Beecher case, it appeared incidentally that various confessions had been made by Mrs. Tilton of infidelity with Beecher, or of improper advances to her by him, or of something of the sort,—there being a dispute as to what exactly it was. Upon this, the counsel for Beecher argued lustily to the jury, that, whatever this matter might be, it should have no weight against him, *because it was wrung out of her weak mind by her awful husband!*⁴³ Could you, young man, under the differing law which probably prevails in your state, manage a *nolle prosequi* well under like circumstances? You would be in peril of being addressed by the court in this wise: "There is no evidence in the case on which to found this argument, and to argue without evidence is not permitted to you. The woman who knows how it is, is separated 'forever,' as you say, from her husband; she has been present in court, the objection to her competency as a witness has been waived on the other side, yet you have refused to call her. Had you called her, that would have opened the whole subject of her confessions, those to whom they were made might have been brought forward as witnesses, and then the jury could have had the real facts before them. The whole question of adultery between these persons might then have been tried. The law permitted you, if you chose, to stand on your strict legal rights, and shut down the gate upon the evidence where you did; but, having done so, you cannot assume as fact what is not testified to, and argue upon evidence which you refused to produce."

⁴³ 3 Tilton-Beecher Trial, 727-729.

I might say more of the *nolle prosequi* as employed in the civil suit of Tilton v. Beecher, but my article is becoming too long, and there is another part of "The Great Nolle Prosequi Case" which I cannot pass unnoticed.

There lies before me a book of about four hundred pages entitled, "Proceedings of the Advisory Council of Congregational Churches and Ministers called by the Plymouth Church of Brooklyn, N. Y., and held in Brooklyn from the 15th to the 24th of February, 1876." When that council was called, the various *nolle prosequi* movements recited in this article, and many others, had taken place. But the council itself was a grand stroke of the *nolle prosequi*. Beecher, with the aid of the Brooklyn prosecuting officer, had laid to sleep the indictments against Moulton, Tilton, and one other person whose case I have not space to consider in this article. No criminal proceeding against Beecher was practically open to anybody, as I have already shown. The form of Tilton's suit,—the only suit which the law would allow him to bring, was such, that, under the guise of reducing the damages, should the verdict be against Beecher, any amount of mere rubbish could be introduced in the defence, having no relation to the main charge, to distract the jury and the public; besides that, as I have shown, Beecher had it in his power and exercised his right, utterly to shut out one-half the relevant evidence against him. But now Tilton was so weakened pecuniarily that he could not renew even this lumbering suit. And, except Moulton, there was, among "the enemy," no person so situated that the law would permit him to bring a suit against Beecher; because the law does not suffer men to occupy the tribunals with mere scandal investigations,—it requires a wrong suffered by the plaintiff, and a pecuniary interest in him. On the other hand, Beecher, had he chosen, could have sued Moulton for libel, called Mrs. Tilton as a witness, and had all the facts fully investigated, and all the evidence thoroughly sifted, before a tribunal having power to call witnesses, and protect them, and compel answers to pertinent questions. There were any number of other suits having the like purpose, legally permissible for *him* to bring.

I remember, for example, in one of the leading New York papers (though I am not quite sure that this was before the calling of the council) appeared a warning letter which some one had kindly sent the editor, telling him that Beecher was laying aside copies of his paper, in which he had marked defamatory articles, preparatory to bringing against him a great libel suit. The editor replied, that the clergyman was giving himself unnecessary labor; then he appended defamatory words, amply sufficient to found a libel suit covering the whole controversy, concluding, in substance: "There is a case for him, let him go ahead."

To add to the environment, Moulton's counsel formed the idea of a malicious prosecution suit against Beecher, to vindicate his character and wife's. The suit was brought, and Beecher was undertaking to stop it with a demurrer. Outside friends began to fear, that, where investigation was so dreaded, and in the one public trial which he had not been able to prevent, he had actually warded it off as to half of the facts, something must be wrong. Hence a *nolle-prosequi* plan was invented, perhaps the shrewdest ever laid. Plymouth church was to crave advice; and, upon this, a letter-missive to sister churches was drawn in such form, that, when a large body of the pastor's friends had assembled and obtained the public ear, all things were permissible to be said in his favor, and he and his lawyer were together present to say them, but nothing against him was in order. If, at any time, the tongues of the pastor and the lawyer failed to be glib enough, there were, on the floor of the council, friends to help on by their enquiries. Opening the "Proceedings" almost at random, I find such questions as these:

"Mr. Beecher, is there any bottom facts that you wish to keep back?"

"I ask, Mr. Beecher, was there ever any weighty evil connected with this case—sometimes called a crime—which you have covered up?"⁴⁴

"How much longer," screams Beecher, "does a man want to have his willingness to have the truth come out, vindi-

⁴⁴ Brooklyn Council of 1876, (that is the title on the back,) p. 194, 195-

cated? If there is any man on earth that has anything to say—that he wants to say—if there is any man on earth that has anything to say to my detriment, I *here and now* challenge him to say it! I go further than that. If there be any angel of God, semi-prescient and omniscient, I challenge him to say aught. I go beyond that, and, in the name of our common Redeemer, and before Him who shall judge you and me, I challenge the truth from God himself!”⁴⁵

Of course, Beecher hastened to the court house and withdrew his demurrer. “You bet”!

Whether or not God heard Beecher’s cry, and how about the angels, the “Proceedings” do not disclose. Moulton heard it. But as the makers of books have the right to put into them what they choose, this “proceeding” is omitted. He sent to the council, through the Moderator, a letter offering to produce the evidence called for “here and now.” This letter appears to have influenced the “Result of Council,” as the reader will perceive.

The “Result of Council,” after determining the questions on which it was ostensibly called, and declaring in substance that a prior investigation by a Church Committee had been ample, and the disagreement of the jury in the Tilton case was a good enough verdict for the defendant, proceeds:—

“In view of these facts, and also of the fact that the pastor of this church has demanded that his accusers be brought to face him [!!] and has invited such investigation as this council may think desirable for the peace and prosperity of the churches, and in order to protect Plymouth church from further vexatious proceedings, this council advises this church to accept and empower a commission of five members, to be created by a committee of three, hereinafter specified, out of the twenty men hereinafter named; the duty of which commission shall be to receive and examine all charges against the pastor which they may regard as *not already tried*.”⁴⁶

The council, the reader perceives, had laid down the

⁴⁵ Brooklyn Council, *ut sup.*, p. 240.

⁴⁶ Brooklyn Council, *ut sup.*, p. 330.

rule as to the Tilton charges; that is, that they had been tried, and well and sufficiently so, both by a committee which Beecher and the church had appointed, and by the court in Tilton's suit. But there were then pending, it was understood, charges wrung out of Bowen, and still others might be floating; therefore to such the authority of this "Commission" was to attack. If there were any doubts on this point it is removed by what follows:—

"It is provided, however, that this commission shall not be constituted unless formal charges against the pastor shall be brought before the church or its Examining Committee within sixty days after the dissolution of this council, by a party or parties making themselves responsible for the truth and proof of the same, or unless within the same time it shall be deemed expedient by the Examining Committee of the church and the committee of three, that important testimony not previously given, which might throw light upon charges which *hitherto have been tried* should be heard by this commission."⁴⁷

As the Examining Committee could be trusted not to bring out anything against Beecher, the plain meaning of this was, that, if anything new could be found in his favor, on the Tilton charges, the evidence should be presented to the public through this commission; but nothing more against him should be produced. The pestiferous Moulton was laid low. The alleged perjury from which he wished to vindicate himself and wife, was committed, if at all, on the trial of the Tilton charges. He had been too audacious in offering to prove his case before the council, peradventure he might even go before the Commission if permitted; so, to make all sure, the *nolle prosequi* was introduced into the "Result of Council" itself.⁴⁸

⁴⁷ *Ib. ut sup.*

⁴⁸ As I am writing for the instruction of young lawyers, I have in the text limited my explanation of the *nolle prosequi* at this point in The Great Nolle Prosequi Case to so much as hitherto plainly appears. According to the book of "Proceedings" already referred to, the following resolution was, among others, adopted by Beecher's church, Feb. 25, 1876:

Young man, just entering upon legal practice, could you get up such a council? Think! There was mighty administrative talent in it. The head that could so judge of character as to select a council composed of honored ministers of the gospel, and praying church members, to do a work like that, ought to be on the shoulders of the President of the United States. We live in times of political corruption; but if the people could be persuaded to elect the author of this council President, he could appoint men to office, every one of whom would do *exactly what was required of him*. The bribery and speculation, and every other evil thing of a public nature, would be at an end.

At the risk of seeming prolix, I must add a word to you.

"*Resolved*, That Plymouth Church gladly and unreservedly accept the advice and admonition of the Advisory Council, and will promptly carry into effect all the recommendations of that Council; and that in pursuance of those recommendations, it does now invite and challenge any and all persons who are willing to be responsible for charges against the pastor of this church to bring forward such charges in the manner prescribed by the 'Result of the Council,' this church pledging itself to cause an investigation immediately to be made in the manner advised by the Council, and under the direction of the committee appointed thereby." Page 361.

Now this resolution would seem, to one who had never read anything else on the subject, to open the door for an ecclesiastical trial of the Moulton charges, and to permit Moulton, if he chose, to present them and become "responsible" for them. But those charges had been already tried, as the "Result of Council" declared, both ecclesiastically and civilly; and the jurisdiction of the "Commission of Five," when sitting on charges presented by a person who should become "responsible" for them, was in terms limited to charges "*not* already tried." The language of the "Result of Council" was, at this place, so plain, that it could not possibly be misinterpreted. And the resolution of the church expressly promises to "carry into effect all the recommendations of the Council." Is there a *nolle prosequi* coiled here? Are verdant people to be made hereafter to believe, that a full investigation of the entire Beecher scandal was provided for by the Council, and accepted by the church, and the world was challenged to bring on its proofs? I do not know. Perhaps time will disclose.

Again, there may possibly be ground for dispute as to the nature of the contemplated procedure before the "Commission of Five." The "Result of Council" is distinct on one point. The original investigation

lawyers on the danger of employing the *nolle prosequi*, however skilfully, in the defence of innocent men. And I know of no case which illustrates the danger more clearly than this of Beecher. Thus, among the letters which Beecher received from Mrs. Tilton, was the following, not signed, but in her handwriting :

" BROOKLYN, May 3, 1871.

" MR. BEECHER : My future, either for life or death, would be happier could I but feel that you *forgave* me while you forget me. In all the sad complications of the past years, my endeavor was to entirely keep from *you* all suffering ; to bear myself alone, leaving you forever ignorant of it. My weapons were love, a larger, untiring generosity, and *nest-*

ing committee appointed by Beecher and his church are commended throughout for their course. " They," says the " Result," " sat in secret, as every such inquest does and ought to ; they used such a discretion as is allowed to every similar investigation in calling for witnesses, and in judging whether their testimony would be material." Page 330. This is plainly enough meant as a direction to the " Commission of Five." But on the forms attending the production of witnesses there may be doubt. One of the members of the committee thus commended had written a letter to a gentleman whom some persons supposed to be an important witness, containing the following :

" My principal object in writing is to suggest, in case he [Tilton] publishes the [Woodstock] letter, to you whether you could not write a letter which would make your remarks in the Woodstock letter refer to matters and troubles in the way of business, which were abundant about that time, and which would naturally make some feeling on your part toward Mr. Beecher, and which you would have been likely to express in perhaps an extravagant manner to an intimate friend and associate, as Tilton was at that time. Such an explanation would look well for Mr. Beecher and yourself ; in fact, it seems to me much more important for you than for Mr. Beecher." Page 268.

The gentleman to whom this letter was addressed was not, in fact, a witness before that committee. Were the " Commission of Five " to write letters to the respective persons who might be named as witnesses, and suggest to each how the testimony might be put to " look well for Mr. Beecher and yourself," adding, " if you cannot put it so, consider that a *nolle prosequi* has been entered to your subpoena " ?

I have simply, in this note, mentioned these points to show that they have not been overlooked, but I do not know that much instruction can be derived from them to aid the young practitioner.

hiding! That I failed utterly we both know. But now I ask forgiveness."⁴⁹

At the trial of Tilton's suit, much doubt and dispute arose as to what the lady meant by *nest-hiding!* underscored, with an exclamation point after it. Beecher said in his testimony: "I understood it to signify simply the hiding of the troubles in our household."⁵⁰

Was this true? And what troubles? Did they flow from the offence with which Tilton charged Beecher, or from some other source?

"Nest-hiding," in its primary meaning, is as plain a term as the language contains. We have great numbers of compound words like it; such as "house-breaking," "bell-ringing," "bird-catching," "pigeon-shooting," "deer-hunting," "wood-chopping," "wood-sawing," "water-drawing,"—which signify breaking house or breaking *the* or *a* house, and so of all the rest. The only ambiguity concerns the particle *a* or *the*; in some renderings, it is not to be employed, in others it is *a*, and in others *the*. Therefore the literal meaning of *nest-hiding* is *hiding the nest*, or *hiding a nest*, or *hiding nest*. "My weapons were love, a larger, untiring generosity, and *hiding the nest!*" Does "nest" mean "troubles," as Beecher says it does? Some people will doubt this; deeming that birds would not labor so much to build it, for the repose of their eggs and their brood, if it was "troubles." Had the "nest" of which Mrs. Tilton speaks, brought "troubles"? Where was the "nest"? Beecher's interpretation seems to put it at her own house. Then, why does a married woman hide the "nest" in her own house? And what occasion was there that Beecher should forgive and forget her? These and similar doubts were to some minds distressing.

But, had there been no *nolle prosequi*,—in other words, had Mrs. Tilton been produced as a witness,—she could have explained her meaning, and dissipated all doubts. Perhaps there was a tree in her back yard, and a bird's nest in it, and she hung up a sheet to hide it from pilfering boys. But

⁴⁹ 1 Tilton-Beecher Trial, 84. 2 Ib. 812; 3 Ib. 73.

⁵⁰ 2 Ib. 813.

that could hardly be the true explanation; for it does not connect Beecher with the transaction, and it furnishes no occasion for him to forgive and forget Mrs. Tilton. Or, it may be that Mrs. Tilton had a hen, and Beecher had a bad boy; and, as often as the hen laid an egg, the boy stole it, in which emergency Mrs. Tilton *hid the nest*! But, as Beecher would be glad when his boy was circumvented, this could hardly furnish a reason why he should forgive and forget Mrs. Tilton. Neither of these explanations, therefore, could be accepted; but doubtless there was some other explanation, equally simple and plain, which was the true one. Yet, unfortunately for an innocent man, the *nolle prosequi* kept it from appearing.

I mention this letter, and the doubt about its meaning, only in illustration of the great benefit which might have been derived by this innocent clergyman from the truthful statement on oath of Mrs. Tilton, had it not been for the unfortunate *nolle prosequi*. The lady, on her exclusion from the witness seat, wrote a letter to the judge, reminding him that she was now, having forsaken her husband and cast herself into the arms of the Beecher party, in a situation to tell the truth,—“released,” she says, “for some months from the *will* by whose power unconsciously I criminated myself again and again.” And she asked to be permitted to testify.⁵¹ Herein she confirms the floating newspaper reports, that she has often confessed the crime which her husband charges against her and her pastor. Having done this, as she says, “again and again,” and being a member in good standing in Beecher’s church, and no complaint having been made in the church against her for doing it, and no investigation being permitted of the circumstances under which these confessions were made,—that is, the *nolle prosequi* being always present when this part of the case was proposed to be opened,—she, on the one side, and the managers of the *nolle prosequi*, on the other, have created serious apprehensions, in the minds of many persons, which might have been

⁵¹ 3 Tilton-Beecher Trial, 355.

dispelled, had she been permitted, as she asked, to tell her "*whole story truthfully.*"

In the first place, this truthful tale, could Beecher have been persuaded to permit it, would have been told to the jury in Tilton's suit. And "truth is mighty and will prevail." In this instance, it would have been confirmed in the very chair where Mrs. Tilton sat to tell it, by the persons to whom she had previously uttered the untruths about herself and Beecher; they would point out the times and circumstances, and explain how the husband's "*will*" was working on the wife, and thus innocence would shine in the very blaze of truth. The absurd story, since published, that, when Bowen, one of the founders of the church, had been compelled by a church committee to profess his belief in Beecher's guilt, then had been arraigned before the church committee for slander of the pastor in making this profession, this committee refused to permit him to prove, as influencing his belief, confessions made by Mrs. Tilton *after* (as well as before) she had abandoned her husband forever, and become "truthful,"—she still remaining in the church in good standing, and no investigation of the charges against her being permitted, while Bowen was excommunicated,—could not have found voice in the public journals.

"The real point to avoid," wrote Beecher to Moulton, before his mind had come fully under the influence of legal advice, "is an appeal to church, and *then a council.*"⁵² Before the "Advisory Council" was called, Beecher was master of the situation, as I have already shown. He had filed a demurrer to the only suit which lawyers could devise against him; and, thus far, he is successful in staving it off. He had it in his power, and still has, to withdraw his demurrer, or to bring suit resulting in a full and thorough investigation of the whole matter, before the whole people, thus vindicating his innocence. But this "Council," instead of advising him to do any such thing, appointed a "Commission" before whom no man could appear to re-try the

⁵² 1 Tilton-Beecher Trial, 87. The letter is without date except simply the word "Monday."

Tilton charges,⁵³ or investigate the "nest" which Mrs. Tilton hid, or otherwise bring out those "truthful" and "whole" explanations which would remove the last cloud from the innocent pastor's damaged fame.

⁵³ It has not been necessary for me to consider, in the text, whether or not it would be safe for any man to go before the proposed "Commission of Five" with any charges against Beecher, whatever their nature or however clear their proof. They were, first, to be presented to "the church or its examining committee;" secondly, "by a party or parties *making themselves responsible for the truth and proof* of the same;" then, thirdly, to be taken before the "Commission of Five," as a sort of board of referees.

In judicial and semi-judicial proceedings, as hitherto known to the law, the charges which the complainant lays before the tribunal, whether legal, ecclesiastical, or any other, are *privileged*, to use a word familiar in the law of libel. But, as the law of libel is generally understood, one who is entitled to make a privileged communication may waive the privilege, and then he can defend himself against an action for libel only by proving the truth of his allegation. And the expression "I hold myself responsible for the truth and proof of what I allege" is such as, in the law of libel, is generally understood to be a waiver of the privilege. A party, then, makes his written charge against Beecher, before the church committee, and *waives his privilege*. Upon this, the charge is taken for arbitration before the "Commission of Five," and the finding of the commission is against him. I do not see why, in these circumstances, he must not be conclusively holden to have slandered the pastor; so that, if an action for the slander is brought, he will be bound by the "commission's" award, not being permitted to prove the truth. The question is probably a new one, and there is no occasion to express an absolute opinion upon it. Clearly enough this is what was meant by the power at the wires, managing the *nolle prosequi* before the council, whatever might be the idea of individual members.

If this were not so, still no sane man would ever have taken a case against Beecher, however clear, before this "Commission of Five," composed, nobody could know beforehand of whom, sitting in secret, not governed by known rules of evidence, with an unknown procedure in other respects, answerable to nobody, and permitted by its constitution to hear or reject a witness as it chose. Add to this, that the attendance of no witness before it could be compelled, that witnesses without limit might be produced on the other side, who could testify to what they chose without subjecting themselves to the pains of perjury; and, more than all, that, on the very face of things, the tribunal was a device to enable Beecher to escape the pressure of public opinion while refusing to come to a trial, and let in the whole evidence, in an open court of justice.

In the first place, this innocent man was ensnared by Moulton and Tilton, who counselled him to hush up things, and he hushed them up. Then he fell into the more damaging hands of famous lawyers, who echoed, but with increased volume of tone, the old bad counsel, "Hush up;" therefore he hushed up all he could, but he was unable to hush up the whole. Lastly, he summoned a vast "Advisory Council," and their advice was: "Pretend to submit yourself to investigation, but really 'Hush up'! A man whose head has been so broken by bad advice as yours, ought, by this time, to have *two faces*!"

Here we see the misfortune which follows the use of the *nolle prosequi* in the defence of innocence.

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*VI. INCIDENTAL INJURIES FROM THE EXERCISE
OF LAWFUL RIGHTS.*

A tort consists in some act or omission by one party whereby the lawful rights of another are invaded, obstructed or abridged. The elements of a tort are a wrong and a resulting damage; there is no tort where there is no wrong, and there is also no tort where there is no damage. The wrong, however, need not be one of intent, for the most innocent invasion of one's rights is a tort, as well as the most malicious; the malice being in many cases only an aggravation. Neither is it essential that the damage should always be tangible and susceptible of proof, for if a legal right is trampled upon, the law will imply damage, and the implication is conclusive.

In the present paper those cases will be considered in which one person suffers an injury in consequence of the exercise by another person of his legal rights. Many such cases occur in which, although the injury may be severe, the law will award no compensation, there being no tort in the case because there is an absence of that wrong the concurrence of which with damage is essential to an action. Negligence might supply the wrong, but we now speak of cases of which that is not an element.

It is almost impossible to conceive of a lawful action that may not by possibility cause injury to another. One man establishes a store which takes away from the profits of a store already established; he erects a mill, in consequence of which the value of another in the vicinity is sensibly diminished;¹ he collects his debt, and the debtor's business is broken up to the prejudice of others who were customers; he assists in starting a new town, which draws away the business from an

¹ *Palmer v. Mulligan*, 3 Caines 307, 313; *Platt v. Johnson*, 15 Johns. 213.

older one ; or he gives to the public a park on one side of a city, which changes relative values to the prejudice of the opposite side ;—in all these cases the injury may be very perceptible and easily traced to the cause which has produced it, but there is manifestly no ground for the suggestion that an action at law should redress it.

Some other cases which must be decided on the same ground do not at first view seem so clear. The case of a house commanding a fine view, which is cut off and destroyed by the erection of a building on the adjacent premises, may be taken as an illustration. The injury here is very direct and special, and it seems to take something from the man's property, and to deprive him in a measure of its enjoyment. But on the other hand, if every man might protect his view against the improvements of his neighbors, it is manifest that it would give him such a control of adjacent property as would preclude improvements, except with his consent ; and to protect his view would usually diminish the value of the neighbor's property more than it would enhance his own. It was determined at an early day that an erection by one on his own premises which obstructed the view of another was not a legal wrong ;² and the principle is held to cover the case of a structure on the party's own land which injures the value of business property in the rear of it by cutting off the view from the street.³ The English law recognizes an easement in air and light over adjoining premises, under some circumstances ; but the courts of the United States regard the doctrine which supports it as unsuited to the circumstances of this country, and incapable of being applied in our growing cities and villages without working most mischievous consequences. The injury which one sustains by having the light and air as they pass to his buildings obstructed and cut off by the structures of his neighbor, will therefore support no action.⁴

¹ Butt v. Imperial Gas Co., L. R. 2 Ch. App. 158.

² Aldred v. Case, 9 Coke, 58 b ; Attorney-General v. Dougherty, 2 Ves. Sr. 453. See Maynard v. Escher, 17 Penn. St. 222.

⁴ Parker v. Foote, 19 Wend. 309, 318, per Bronson, J.; Mahan v.

Collateral Support of Lands.—A man may injure his neighbor's premises by excavations made on his own. Such excavations are rightful up to a certain limit; beyond that they are unauthorized. The common law gave every man a right to collateral support for his own ground in its natural condition by the land of his neighbor; and to that extent the adjoining lands are subject to a servitude. But he has no right to support for the land weighted with buildings; and if an excavation is made, with due care and due notice, into which his buildings fall though without the buildings the natural surface would not have given way, he has no claim to compensation. The injury is incidental to the exercise by his neighbor of a legal right; and a party liable to such an injury must protect himself as best he may. The rule is thus stated in an old case: "If A be seized in fee of copyhold land closely adjoining the land of B, and A erect a new house on his copyhold land, and any part of his house is erected on the confines of his land adjoining the land of B, if B afterwards dig his land so near to the foundation of the house of A that by it the foundation of the messuage and the messuage itself fall into the pit, still no action lies by A against B—inasmuch as it was the fault of A himself that he built his house so near the land of B; for he cannot by his own act prevent B from making the best use of his land that he can. But it seems that a man who has land closely adjoining my land cannot dig his land so near mine that mine would fall into his pit; and an action brought for such an act would lie."⁵

Injuries by Animals.—A man may rightfully keep domestic animals, and use and employ them as is customary. Others may be injured by them, but they are not entitled to redress unless the owner or keeper is personally guilty of negligence

Brown, 13 Wend. 261; Myers v. Gemmel, 10 Barb. 537; Cherry v. Stein, 11 Md. 1; Hicott v. Morris, 10 Ohio St. 523; Mullen v. Stricker, 19 Ohio St. 135; Hubbard v. Town, 33 Vt. 295; Pierce v. Fernald, 26 Me. 436; Ward v. Neal, 37 Ala. 500.

⁵ Wild v. Minstaley, 2 Rol. Abr. 565. The cases on this subject are fully collected in Bigelow's Leading Cases on Torts, 527, *et seq.*, and in Washburn on Easements, 542-564.

or bad conduct. If he keeps an animal he knows to be vicious, without proper restraint, he is liable for the consequences; if he drives a horse furiously, he may be held responsible to one who is run over by him; but he is not liable if he was in the observance of due care, and the injury was accidental. "If one does an injury by unavoidable accident, an action does not lie; *aliter* if any blame attaches to him, though he be innocent of any intention to injure."⁶

Injuries from Fires.—No man can lawfully insist, because of the possibility of a fire spreading to his estate, that his neighbor shall not burn over his fallow or destroy his stubble by fire. A fire for any such purpose, or even for amusement, is perfectly lawful, and if the party setting it is guilty of no negligence, its accidentally spreading to his neighbor cannot charge him with an action.⁷ The old rule was probably more strict, but even that did not hold the party liable where the fire spread from sudden storm, or other cause which could not have been foreseen or controlled by human agency.⁸

Injuries Inflicted in Self-Defence.—A man assaulted has a right to defend himself, and with force and violence proportioned to the real or apparent danger. If, in making such defence, an injury is unintentionally and without negligence done to a third person, this is no tort, for no man does wrong or contracts guilt in defending himself against an aggressor.⁹ The same rule applies to a proper defence of property; an illustration being the case of building a wall to prevent the inroads of the sea, whereby a greater force of water is expended on the lands adjoining.¹⁰ As was said by Lord Ten-

⁶ *Wakeman v. Robinson*, 1 Bing. 213. See *Weaver v. Ward*, Hobart, 134; *Mammac v. White*, 11 C. B. (N. S.) 588.

⁷ *Clark v. Foot*, 8 Johns. 421; *Tourtelotte v. Rosebrook*, 11 Met. 460; *Scott v. Hale*, 16 Me. 326; *Ellis v. Railroad Co.*, 2 Ired. 138; *De France v. Spencer*, 2 Greene, (Iowa) 462; *Fahn v. Reichart*, 8 Wis. 255; *Mich. Cent. R. R. Co. v. Anderson*, 20 Mich. 244; *Burroughs v. Housatonic R. R. Co.*, 15 Conn. 124.

⁸ *Tuberville v. Stamp*, 1 Salk. 13; *Ld. Raym.* 264; *Webb v. Railroad Co.*, 49 N. Y. 420.

⁹ *Scott v. Shepperd*, 3 Wils. 403; 2 Wm. Bl. 892; *Brown v. Kendall*, 6 Cush. 292; *Morris v. Platt*, 32 Conn. 75; *Paxton v. Boyer*, 67 Ill. 132.

¹⁰ In England proprietors of grounds have in some cases been held

terden, in such a case, the only safe rule to lay down is this: that each land-owner for himself may erect such defences for his lands as the necessity of the case requires, leaving it to others in like manner to protect themselves against the common enemy.¹¹

Protecting against the sea, however, and protecting against a flowing stream, or against the ordinary floods of streams, are very different in their nature, and may give rise to different liabilities. Proprietors upon the banks of natural streams are entitled to have them flow on in their natural course; and whatever embankment or structure tends to prevent this, or to increase the flow or force at times or in particular places, to the prejudice of a proprietor, is as much a wrong to him as would be the diversion of the water into a new channel.¹²

liable to trespassers who were injured by spring guns concealed on the premises, and of which the trespasser had no notice or knowledge. The case is an exception to the general rule, and appears to be put upon the ground that where one makes use of these dangerous instruments, humanity requires that the fullest possible notice should be given, and the law of England will not sanction what is inconsistent with humanity; in other words, that without such notice, the setting of spring-guns is an unauthorized act. *Hott v. Wilks*, 3 B. & Ald. 304, *per* Best, J. See *Dean v. Clayton*, 7 Taunton, 489; *Bird v. Holbrook*, 4 Bing. 628, and *Jay v. Whitfield* referred to therein. The keeping of ferocious dogs, or the setting secretly of dangerous traps, is governed by the same rule. *Brock v. Copeland*, 1 Esp. 203; *Townsend v. Wathen*, 9 East, 277; *Sarch v. Blackburn*, 4 C. & P. 297. It is a little uncertain how far this principle can be carried, but doubtless it would be applied in some other cases where that is done by one on his own grounds without sufficient reason, which might result in loss of life or serious injury to those inadvertently, or even intentionally, committing trespass thereon. It has been often held that if one fall into an excavation upon the land of another where he is not expressly or by invitation invited, he has no claim to compensation from the owner. *Blithe v. Topham*, Cro. Jac. 158; *Stone v. Jackson*, 16 C. B. 199; *Howland v. Vincent*, 10 Metc. 373; *Hargreaves v. Deacon*, 25 Mich. 1. But if one dig a pit-fall with the purpose to injure trespassers, "humanity" may require that he be held responsible; and perhaps he should be held responsible in any case of an unguarded excavation so near the public way, that one lawfully using the way might, without gross negligence, fall into it.

¹¹ *The King v. Commoners, etc., of Pagham*, 8 B. & C. 354.

¹² See *Gerrish v. Clough*, 48 N. H. 9. Compare *The King v. Trafford*, 1 B. & Ald. 873; *Williams v. Gale*, 3 H. & J. 231.

Among the most troublesome cases are those which relate to the right of parties in waters which flow or pass from the lands of one proprietor to those of another, either above or below the surface, and to their rights respectively to be protected against such flow or passage when it would be injurious, or to insist upon it when it would be beneficial. A few of these cases will be mentioned:

1. *Drawing off subterranean waters to the prejudice of another.* Lord Ellenborough expressed the opinion in one case that a party who had for twenty years enjoyed the use of a spring on his own premises was entitled to be protected in it against the action of an adjoining proprietor, whose cutting for the purposes of a drain on his own premises drew away the water from it.¹³ But it is now the settled law of England that excavations by a proprietor on his own grounds, for his own purposes, will not render him liable for the accidental injuries which his neighbor may suffer in consequence of the drawing off of the water which percolates through the soil. In the leading case the complaint was that the defendant, by sinking pits, shafts, etc., for mining purposes, had drawn off the water of certain underground springs, streams and water-courses on the land of the plaintiff, which he had theretofore used for manufacturing and other purposes. Tindall, C. J., in delivering the judgment of the Court of Exchequer Chamber in favor of the defendant, declared that the case "is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle which gives to the owner of the soil all that lies beneath the surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes, at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of action."¹⁴

¹³ Balston v. Bensted, 1 Camp. 463.

¹⁴ Acton v. Blundell, 12 M. & W. 324, 353.

In this case the question of prescriptive rights was expressly waived in the opinion of the court, but in a subsequent case in the House of Lords it became necessary to meet it, and it was met with a distinct denial that any such rights could be claimed in sub-surface waters as they naturally percolated or found their way in secret passages through the soil. The facts in the case are stated by Mr. Justice Wightman, delivering the unanimous opinion of the judges, and they show that the complaint was that the defendants, by sinking a well for the supply of a town with water, had abstracted and intercepted underground water that otherwise would have flowed and found its way into a stream on which the plaintiff's mill was situate, and that the quantity so diverted was sufficient to be of sensible value towards the working of the plaintiff's mill. The reasoning on the question of prescriptive right we pass by, but on the main question the previous case in the Exchequer Chamber was fully approved, and some difficulties in the way of supporting an action were so forcibly put as to seem unanswerable. A French Artesian well was referred to, "which was said to draw part of its supplies from a distance of forty miles, but underground, and, as far as is known, from percolating water. In the present case the water which finds its way into the defendant's well is drained from, and percolates through, an extensive district, but it is impossible to say how much from any part. If the rain which has fallen may not be intercepted whilst it is merely percolating through the soil, no man could safely collect the rain water as it fell into a pond; nor would he have a right to intercept its fall before it reached the ground by extensive roofing, from which it might be conveyed to tanks, to the sensible diminution of water which had, before the erection of such impediments, reached the ground and flowed to the plaintiff's mill. In the present case the defendant's well is only a quarter of a mile from the river Wandle; but the question would have been the same if the distance had been ten or twenty or more miles distant, provided the effect had been to prevent underground percolating water from finding its way into the river and in-

creasing its quantity to the detriment of the plaintiff's mill." Such a right, as was well said, was too indefinite and unlimited to be recognized, and it was rejected by the unanimous concurrence of the judges and the law lords.¹⁵ The decision is understood to have settled the law for England, and it has found general acceptance and concurrence in this country.¹⁶

In *Dickinson v. Grand Junction Canal Co.*, it was remarked by the learned Chief Baron that "if the course of a subterranean stream were well known, as is the case with many which sink underground, pursue for a short space a subterraneous course, and then emerge again, it never could be contended that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover had the stream been wholly above ground."¹⁷ Confining this remark to the case of an

¹⁵ *Chasemore v. Richards*, 7 H. L. Cas. 349. The case in the court below is reported in 2 H. & N. 168. On the same point reference may be made to *New River Co. v. Johnson*, 2 El. & El. 435; *Hammond v. Hall*, 10 Sim. 551; *Smith v. Kendrick*, 7 C. B. 566; *The Queen v. Metropolitan Board of Works*, 3 B. & Smith, 710; *Popplewell v. Hodgkinson*, L. R. 4 Exch. 248.

¹⁶ *Greenleaf v. Francis*, 18 Pick. 121; *Wheatley v. Baugh*, 25 Penn. St. 528; *Frazier v. Brown*, 12 Ohio St. 294; *Roath v. Driscoll*, 20 Conn. 533; *Bliss v. Greeley*, 45 N. Y. 671; *N. A. & S. R. R. Co. v. Peterson*, 14 Ind. 112; *Chatfield v. Wilson*, 28 Vt. 49; *Clark v. Conroe*, 38 Vt. 469; *Chase v. Silverstone*, 62 Me. 175. In two New Hampshire cases the doctrine of *Acton v. Blundell* is questioned; but it would hardly seem to have been necessary to a decision of the actual controversies that the point should have been passed upon in either case. *Bassett v. Salisbury Manuf. Co.* 42 N. H. 569; *Swett v. Cutts*, 50 N. H. 439. In *Parker v. B. & M. R. R.* 3 Cush., 107, it was decided that if in consequence of an excavation made for a railroad track the water of a well on an estate adjoining is drawn off and the well thereby rendered dry and useless, the owner of such estate will be entitled to recover damages therefor, in the same manner as for land taken for the railroad, "because the respondents did not own the land; they only acquired a special right to and usufruct in it, upon condition of paying all damages which might thereby be occasioned to others." But see *Commonwealth v. Richter*, 1 Penn. St. 467; *N. A. & S. R. R. Co. v. Peterson*, 14 Ind. 112.

¹⁷ 7 Exch. 282, 300, per Pollock, C. B. In *Dudden v. Guardians, etc.*

underground stream flowing in a well defined and understood channel, there has been a general disposition to accept it as sound law.¹⁸ But one claiming rights in such a stream will be under the necessity of showing its existence. It will not be presumed that a spring comes from such a stream, but rather that it was formed by the ordinary percolations of water in the soil.¹⁹ But when a clearly defined and well known stream is found to exist, rights corresponding to those in streams above ground may be recognized and protected.²⁰

2. *Protection against Falling Waters and Snows.*—A man has a clear legal right to protect his premises against falling waters and snows, though prejudice to others may result. In the case of urban property he may, in erecting buildings and making improvements, do this to the extent of completely preventing the fall of rains and snows upon his grounds, and the only restriction upon the right appears to be this: that adjoining proprietors owe such duties to each other as the requirements of good neighborhood naturally impose; that each must so use his own as not unreasonably to injure his neighbor, but that this only obliges him to use all due care and prudence to protect his neighbor, and does not require that he shall at all events and under all circumstances protect him; and any injury that may result notwithstanding the observance of proper caution, must be deemed incident to the ownership of town property, and can give no right of action. If one constructs his building so as to cast the water therefrom upon the land of another, he is

1 H. & N. 627, the same learned judge said: "It is absurd to say that a man may take the water of such a stream, even though it be four feet from the surface."

¹⁸ See particularly, *Chasemore v. Richards*, 7 H. L. Cas. 349, 373; *Smith v. Adams*, 6 Paige, 435; *Wheatley v. Baugh*, 25 Penn. St. 528; *Whetstone v. Brower*, 29 Penn. St. 59.

¹⁹ *Hanson v. McCue*, 42 Cal. 303. See *Mosier v. Caldwell*, 9 Nev. 363. In *Angell on Watercourses*, § 157, the result of the authorities is stated to be that "in order to bring subterranean streams, within the rules which govern surface streams, their existence and their course must be to some extent known and notorious."

²⁰ *Cole Silver Mining Co. v. Virginia etc. Water Co.*, 1 Sawyer, 470.

liable therefor, not only to the occupant, but to the reversioner;²¹ but if he puts proper eave-troughs or gutters upon his building for leading off the water upon his own grounds, and keeps them in proper order, and is guilty of no negligence in this regard, an adjoining proprietor can have no legal complaint against him for injuries resulting from extraordinary or accidental circumstances for which no one is in fault, but such injuries must be left to be borne by those on whom they fall.²²

3. *Drawing off Surface Water*.—The drawing off of surface water may affect adjoining estates either as it deprives them of the benefit of the ordinary flow in natural watercourse, or as it increases the ordinary flow in such watercourses, or as it casts water through ditches upon adjoining lands, or so near to them that the water percolating through the soil causes the adjoining lands to be wet and unsuited to cultivation, or unproductive. In the first case, that is, where a lower proprietor is deprived of the benefit of the natural flow of the water, or of some portion thereof, it is settled that he can have no remedy. As has been forcibly said, one party cannot insist upon another maintaining his field as a mere water-table for the other's benefit.²³ On the other hand, it is equally well settled that one may lawfully drain his lands into a natural watercourse, even though a lower proprietor is injured by the increased flow.²⁴ "For the sake of agriculture—*agri colendi causa*—a man may drain his ground which is too moist, and, discharging the water according to its natural channel, may cover up and conceal the drains through his natural channel of his streams, though the flow of water upon his

²¹ Baten's Case, 9 Coke, 53 b; Jackson v. Pesked, 1 M. & S. 234; Tucker v. Newman, 11 A. & El. 40; Fay v. Prentice, 1 M. G. & S. 828.

²² Underwood v. Waldron, 33 Mich. Compare Bellows v. Sackett, 15 Barb. 99; Hoare v. Dickinson, Ld. Raym. 1568.

²³ Rawston v. Taylor, 11 Exch. 369, per Platt. B. See Broadben v. Ramsbotham, 11 Exch. 602; Livingston v. McDonald, 21 Iowa, 160, 167; Waffle v. N. Y. Cent. R. R. Co., 58 Barb. 413; Thayer v. Brooks, 17 Ohio, 491; Colt v. Lewiston, 36 N. Y. 217.

²⁴ Williams v. Gale, 3 H. & Johnson, 231; Miller v. Lauback, 47 Penn. St. 154; Waffle v. Porter, 61 Barb. 130. See Kauffman v. Griesemer, 26 Penn. St. 407.

neighbor be thereby increased. * * It is not more agreeable to the laws of nature that water should descend than it is that lands should be farmed and mined; but in many cases he thereby diminishes, not unreasonably, the supply of his neighbor below; and may clear out impediments in the natural lands; may use running streams to irrigate his fields, though they cannot be, if an increased volume of water may not be discharged through natural channels and outlets. The principle, therefore, should be maintained, but it should be prudently applied,"²⁵ and it will not preclude the lower proprietor erecting any such protections as may be needful to guard his lands against the additional flow, provided they do not intercept the passage of water which would naturally pass on to his land.²⁶ In Massachusetts it has been decided that one may erect barriers to prevent surface water which has accumulated elsewhere from coming upon his land, even though it is thereby made to flow upon the land of another to his loss. "The right of an owner of land to occupy and improve it in such manner and for such purposes, as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation, in any portion of it, will cause water, which may accumulate thereon by rains and snows falling on its surface, or flowing on to it over the surface of adjacent lands, to pass into and over the same in greater quantities or in other directions than they were accustomed to flow."²⁷ The point of these decisions is, that where there is no watercourse by grant or prescription, and no stipulation exists between conterminous proprietors of land concerning the mode in which their respective parcels shall be occupied and improved, no right to regulate or control the surface drainage of water can be asserted by the owner of one lot

²⁵ Woodward, J., in *Kauffman v. Griesemer*, 26 Penn. St. 407, 414.

²⁶ Ibid. See *Butler v. Peck*, 16 Ohio St., 334.

²⁷ Citing *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Flagg v. Worcester*, 13 Gray, 601; *Dickinson v. Worcester*, 7 Allen, 19.

over that of his neighbor. *Cujus est solum, ejus est usque ad cælum* is a general rule applicable to the use and enjoyment of real property, and the right of a party to the free and unfettered control of his own land, above, upon and beneath the surface, cannot be interfered with or restrained by any considerations of injury to others which may be occasioned by the flow of mere surface water in consequence of the lawful appropriation of land by its owner to a particular use or mode of enjoyment. Nor is it at all material, in the application of this principle of law, whether a party obstructs or changes the direction and flow of surface water by preventing it from coming within the limits of his land, or by erecting barriers or changing the level of the soil, so as to turn it off in a new course after it has come within his boundaries. The obstruction of surface water, or an alteration in the flow of it, affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil."²⁸

The question of liability where one improves his land by artificial drains, which cast the water upon a lower proprietor, is difficult. No doubt he may improve them by filling up low and wet places without incurring liability to a lower proprietor upon whom the flow would be increased,²⁹ just as the public may lawfully improve the streets and public grounds, though the improvement may have the effect to cast the falling or surface water upon adjoining grounds.³⁰ A natural watercourse of course must not be stopped up, and the water turned back upon the lands of another proprietor.³¹

²⁸ *Gannon v. Hargadon*, 10 Allen, 106, *per* Bigelow, Ch. J.

²⁹ *Goodale v. Tuttle*, 27 N. Y. 459; *Flagg v. Worcester*, 13 Gray, 601; *Hoyt v. Hudson*, 27 Wis. 656.

³¹ *Martin v. Riddle*, 26 Penn. St. 415; *Luther v. Winnisimmet Co.*, 9 Cush. 171.

³⁰ *Parks v. Newburyport*, 10 Gray, 28; *Flagg v. Worcester*, 13 Gray, 601; *Dickenson v. Worcester*, 7 Allen, 19; *Turner v. Dartmouth*, 13 Allen, 291; *Emery v. Lowell*, 104 Mass. 16; *Inaler v. Springfield*, 55 Mo. 119. If the proprietor of the adjoining lands protects them by an embankment which throws the water back into the road, the public have no cause for complaint. *Franklin v. Fisk*, 13 Allen, 211.

But "the true watercourse is well defined. There must be a stream *usually* flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides or banks, and usually discharge itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes. It does not include the water flowing in the hollows or ravines in land which is the mere surface water from rain or melting snow, and is discharged through them from a higher to a lower level, but which at other times are destitute of water. Such hollows or ravines are not in legal contemplation water-courses."³²

In Iowa, in a carefully considered case, it was held that if a ditch made by the defendant for the purpose of draining his lands, and which terminated within sixty feet of the line of the plaintiff, had the effect to increase the quantity of water on the plaintiff's land to his injury, or, without increasing it, threw the water upon the land in a different manner from what the same would naturally have flowed upon it, to his injury, the defendant would be liable for the injury, even though the ditch was constructed by the defendant in the course of the ordinary use and improvement of his farm.³³ So in Wisconsin it has been decided that the owner of land on which there is a pond or reservoir of surface water cannot lawfully discharge it through an artificial channel upon the land of another, or so near it that it will flow over upon such land to its injury.³⁴ A case in Ohio somewhat similar was

³² Dixon, Ch. J., in *Hoyt v. Hudson*, 27 Wis. 656, 661. In the same case an intimation in *Bowlsby v. Speer*, 31 N. J. 351, that there may possibly be an exception to this proposition in the case of gorges and narrow passages in hills or mountainous regions is repeated. As bearing on the question, see *Eulrich v. Richter*, 37 Wis. 226.

³³ *Livingston v. McDonald*, 21 Iowa, 160. See *Reynolds v. Clark*, *Ld. Raym.* 1399; *Lane v. Jasper*, 39 Ill. 54. The case of *Adams v. Walker*, 34 Conn. 466, the facts of which are somewhat imperfectly stated in the report, supports the same principle, and perhaps goes somewhat further.

³⁴ *Pettigrew v. Evansville*, 25 Wis. 223.

decided in the same way. In that case a part of the water which the defendant discharged upon the land of the plaintiff would naturally have found its way there had the drain not been cut.³⁵ These cases seem to confine the obligation of the owner of the lower estate to receive the waters flowing from the upper estate, to "waters which flow naturally without the art of man; those which come from springs, or from rain falling directly on the heritage, or even by the natural dispositions of the place."³⁶

4 Collecting Water in Reservoirs.—A man may lawfully collect water in reservoirs on his premises. What the corresponding rights of his neighbors are is not very satisfactorily determined. Beyond question they have a right to be protected against any injurious consequences that might result from a negligent construction of the reservoirs, or from any want of care on the part of the person constructing or maintaining them, in consequence of which the water might escape to their injury, by percolation or otherwise.³⁷ Whether parties maintaining such reservoirs are not bound to a still stricter responsibility, is a question we do not care to enter upon in this place.³⁸ Neither do we deem it of importance to refer to more familiar questions relating to water rights. Our purpose has been only to present some classes of cases which may supply proper illustrations of the general principle which is stated at the beginning of the present paper.

Malice as an Ingredient in Torts.—As injury alone does not give a right of action, neither, as a general rule, do injury and malice combined. There must be a combination of wrong

³⁵ Butler v. Peck, 16 Ohio St., 334.

³⁶ Kauffman v. Griesemer, 26 Penn. St. 407, 413. See Martin v. Jett, 12 La. 501. As to the right of the upper proprietor to have natural passage for the surface water kept open for his drainage, though they are not watercourses, see Franklin v. Fisk, 13 Allen, 211; Goodale v. Tuttle, 29 N. Y. 459; Tootle v. Clifton, 22 Ohio St., 247; Martin, *ex parte*, 13 Ark. 198.

³⁷ Monson Manf. Co. v. Fuller, 15 Pick. 334; Fuller v. Chicopee Manf. Co., 16 Gray, 46; Wilson v. New Bedford, 108 Mass. 261; Prixley v. Clark, 35 N. Y. 520.

³⁸ See Rylands v. Fletcher, L. R. 1 Exch. 265; s. c. in error, 3 H. L. Cas. 330.

and injury to constitute a tort, and malice is not of itself a legal wrong. If one is only exercising his lawful rights, others can have no concern with his motives. A man may establish a business with the malicious purpose to destroy the business of his neighbor. This is no tort, whether he accomplishes his purpose or not, for he had a clear legal right to establish a new business, and his motives in doing so are not to be enquired into.³⁹

"An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent."⁴⁰ This remark was made in a case where a landlord was charged with having maliciously distrained for more rent than was due to him, but it was only the statement of a principle that is as old as the common law. It has been applied in a case in which a prosecution was alleged to have been instituted maliciously, but where there was not an absence of probable cause,⁴¹ and to cases of alleged malicious arrest of persons, privileged from arrest by being in attendance on court on subpoena, or by other causes,⁴² and of maliciously issuing execution on a judgment which had been entered up for too large an amount, but which had not been corrected at the time suit was brought.⁴³

In *Mahan v. Brown* the plaintiff declared against the defendant for wantonly and maliciously erecting on his own premises a high fence near to and in front of the plaintiff's

³⁹ *Auburn & Cato Plank R. Co. v. Douglass*, 9 N. Y. 450.

⁴⁰ *Parke, B.*, in *Stevenson v. Newnham*, 13 C. B. 285, 297. See *Floyd v. Barbee*, 12 Coke, 23; *Stowball v. Ansell*, Comb. 11; *Tayler v. Hunniker*, 12 Ad. & El. 488; *Heald v. Carey*, 11 C. B. 993; *Clinton v. Myers*, 46 N. Y. 511; *Covanhoven v. Hart*, 21 Penn. St., 501; *Jenkins v. Fowler*, 24 Penn. St. 308; *Fowler v. Jenkins*, 28 Penn. St. 176; *Glendon Iron Co. v. Uhler*, 75 Penn. St. 467; *Smith v. Johnson*, 76 Penn. St. 191.

⁴¹ *Anonymous*, 6 Mod. 73; *Williams v. Tayler*, 6 Bingham, 183; *Forshay v. Ferguson*, 2 Denio, 617, 620; *Ammerman v. Crosby*, 26 Ind. 451; *Barton v. Kavanaugh*, 12 La. An. 332.

⁴² *Vandevelde v. Lluellin*, 1 Keb. 220; *Maguay v. Burt*, 5 Q. B. 381.

⁴³ *Huffer v. Allen*, L. R. 2 Exch. 15. See *Gerard v. Lewis*, 2 C. P. 305, in which Willes, J., says that the words "wrongfully and unlawfully" are mere words of vituperation, and amount to nothing unless they show a cause of action."

windows, without benefit or advantage to himself, and for the sole purpose of annoying the plaintiff, thereby obstructing the air and light from entering her windows, and rendering her house uninhabitable. The court held that the action would not lie. "The defendant has not so used his property as to injure another. No one, legally speaking, is injured or damnified, unless some right is infringed. The refusal or discontinuance of a favor gives no cause of action. The plaintiff in this case has only been refused the use of ~~that~~^{the} which did not belong to her; and whether the motives of the defendant were good or bad, she has no legal cause of complaint."⁴⁴

In the South Royalton Bank v. The Suffolk Bank ~~the~~^{the} same principle was involved. The defendants were charged with having maliciously and with intent to injure the plaintiff gathered up its circulating bills, and taken them out of circulation, and afterwards presented them in quantities for redemption to the injury of the plaintiff. On demurrer the court say: "Motive alone is not enough to render the defendants liable for doing those acts which they had a right to do. It is too well settled to need authority that malice alone will not sustain an action for a vexatious suit. There must also be want of probable cause. This principle is enough to settle this case. If the defendants could not be sued for instituting suits maliciously to collect pay upon the plaintiff's bills, which they lawfully held, much less could they be sued for simply calling upon the defendants for pay, without the intervention of a suit, though done with malice. It may be true that sometimes the consequences attending an act may serve to give character to that act, and the rule has become established and grown into a maxim, that a man must use his own rights with due regard to the rights of others; but this principle does not apply to the present case. Here the act of presenting the plaintiff's bill for payment has no natural connection with any injurious consequences to follow from it, and if such consequences follow, they

⁴⁴ Mahan v. Brown, 13 Wend. 261, 265, *per* Savage, Ch. J. See Pantton v. Holland, 17 Johns. 92.

must be fortuitous, and cannot give character to the act so as to render it unlawful,"⁴⁵

The same principle was applied in the case of *Hunt v. Simonds*, in which the plaintiff declared against insurance officers for maliciously conspiring to refuse insurance on his property to his injury. As he had no legal right to demand to be insured by them, it was clear that they had a lawful right to refuse; and whether they did this from good motives or from bad motives was of no legal importance.⁴⁶

The case of public officers who have discretionary or judicial duties to perform is familiar. "The law will not allow malice and corruption to be charged in a civil suit against such an officer for what he does in the performance of a judicial duty."⁴⁷ "If a jury will find a special verdict; if a judge will take time to consider; if a bishop will delay a patron and impanel a jury to enquire of the right of patronage; you cannot bring an action for these delays, though you suppose it to be done maliciously and on purpose to put you to charges; though you suppose it be done *scienter* knowing the law to be clear; for they take but the liberty the law has provided, and there can be no demonstration that they have not real doubts, for these are within their own breasts; and it would be very mischievous that a man might not have leave to doubt without so great a peril."⁴⁸ As was remarked in a case in which a surveyor of highways was charged with maliciously working the highway in a manner detrimental to the plaintiff: "The true enquiry was,

⁴⁵ Bennett, J. in *South Royalton Bank v. Suffolk Bank*, 27 Vt. 505, 508.

⁴⁶ *Hunt v. Simonds*, 19 Mo. 583.

⁴⁷ Beardsley, J., in *Weaver v. Devendorf*, 3 Denio, 120. See *Floyd v. Bender*, 12 Coke, 23; *Evans v. Foster*, 1 N. H. 377; *Yates v. Lansing*, 5 Johns. 282; s. c. in *Error*, 9 Johns. 394; *Laning v. Bentham*, 2 Bay, 1; *Brodie v. Rutledge*, Ibid. 69; *Pratt v. Gardner*, 2 Cush. 68; *Garnett v. Ferrand*, 6 B. & C. 611; *Dicas v. Lord Brougham*, 6 C. & P. 249; *Fray v. Blackburn*, 3 B. & S. 576; *Dawkins v. Lord Rokeby*, 5 Q. B. 108; s. c. in *Error*, 4 Fost. & Fin. 806.

⁴⁸ North, Ch. J., in *Barnardiston v. Soame*, 6 How. State Trials, 1099. See *Scott v. Stansfield*, L. R. 3 Exch. 220. The subject was largely considered in *Bradley v. Fisher*, 13 Wall. 335.

whether the defendant had legal authority to do what he did in the highway. If he had such authority, and acted within the scope of it, he is not a trespasser because his motives or purposes with respect to the plaintiff were unkind or malicious."⁴⁹

Within this principle, also falls the case of one in authority, who, under a discretionary power pertaining to his office, puts a subordinate on trial for alleged violation of the laws. The exercise of such a discretion cannot be a tort, even though bad motive or want of probable cause be charged.⁵⁰ Neither can the malice of a witness in giving injurious testimony, nor the malice of a party in making injurious allegations in affidavits which he files in the course of judicial proceedings render him liable to an action at the suit of the party aggrieved.⁵¹ These cases are referred to as illustrations merely; there are many others in which the same principle is applied.

It has been made a question whether the principle is applicable in cases where one is dealing with surface water, or water percolating through the soil of his premises, to the injury of his neighbor. In *Chatfield v. Wilson* it was applied without hesitation. The case was one of gathering water on the defendant's premises which otherwise would have percolated through the soil of the plaintiff, supplying a reservoir and aqueduct which had been constructed by him, and malice was charged. "There are," it is said by the court, "many cases in the books relating to the relative use of surface streams, where the case has turned upon the question whether the use was reasonable, and for the party's own convenience or benefit, or wanton and malicious, and done to prejudice the rights of another. In such cases there are cor-

⁴⁹ Thomas, J. in *Benjamin v. Wheeler*, 8 Gray, 409; see *Sage v. Laurain*, 19 Mich. 137; *Thornton v. Thornton*, 64 N. C. 211.

⁵⁰ *Johnston v. Sutton*, 1 T. R. 549; *Freer v. Marshall*, 4 Fost. & Fin. 485; *Dawkins v. Lord Pawlett*, L. R. 5 Q. B. 94; *Dawkins v. Lord Rokeby*, L. R. 8 Q. B. 285, and 4 Fost. & Fin. 806.

⁵¹ *Dampport v. Simpson*, Cro Eliz. 520; *Revis v. Smith*, 18 C. B. 125; *Henderson v. Broomhead*, 4 H. & N. 569; *Cunningham v. Brown*, 18 Vt. 123; *Dunlap v. Glidden*, 31 Me. 435; *White v. Carroll*, 42 N. Y. 166.

relative rights to the use of the water, and the boundary of the right is a *reasonable* use of it. But such cases have no analogy to the case at bar, and it may be laid down as a position not to be controverted, that an act legal in itself, violating no right, cannot be made actionable on the ground of the motive which induced it. Such was the case of *South Royalton Bank v. Suffolk Bank*, 27 Vt. 505. If the act is lawful, although it may be prejudicial, it is *damnum absque injuria*. On this point the case of *Mahan v. Brown*, 13 Wend. 261, is a direct authority.⁵² This view appears also to have been accepted in Ohio, "subject only to the possible exception of a case of unmixed malice."⁵³ The intimations the other way have, however, been very strong. Lord Cranworth, in *Chasemore v. Richards*, expressed very great doubt whether a party would be at liberty to abstract water on his own premises for the use, unconnected with his own estate, of those who would have had no right to take it directly themselves, to the injury of neighboring proprietors who would have had an equal right with him.⁵⁴ In Massachusetts the instructions of the trial court, that if the defendant dug the well which drew water away from the plaintiff, for the purpose of injuring the plaintiff, and not for the purpose of obtaining water for his own use, he was liable for so doing, were very distinctly approved by the court in banc.⁵⁵ And the Supreme Court of Pennsylvania appears to have recognized the same doctrine in several cases.⁵⁶

There seems to be some difficulty in laying down a rule for these cases that will be quite satisfactory in principle and in its workings. That a man may lawfully make an excavation on his premises for the sole purpose of drawing away the water from his neighbor's well and rendering it useless,

⁵² *Chatfield v. Wilson*, 28 Vt. 49, 57.

⁵³ *Frazier v. Brown*, 12 Ohio St., 294, 304.

⁵⁴ *Chasemore v. Richards*, 7 H. L. Cas. 349, 388.

⁵⁵ *Greenleaf v. Francis*, 18 Pick. 117, 122.

⁵⁶ *Wheatley v. Baugh*, 25 Penn. St. 528; *Whetstone v. Bowser*, 29 Penn. St. 59; *Haldeman v. Bruckhardt*, 45 Penn. St. 514. See, also, *Trustees of Delphi etc. v. Youmans*, 50 Barb. 516; *Waffle v. Porter*, 61 Barb. 130.

seems to be, and is in fact, a monstrous doctrine. On the other hand it cannot be held consistent with the authorities, or perhaps with reason, that adjoining proprietors have rights in the water percolating through the soil, corresponding to those they may have in a running stream which crosses their several estates. Such a rule would raise questions of reasonable use, and create difficulties both of evidence and of application that would make the right to such waters more troublesome than valuable. The courts have doubtless been right in declaring that one proprietor cannot insist on another keeping his estate as a filter for the use of the former, nor be heard to complain if the use by his neighbor of his own estate draws off the secret particles of water which otherwise he might have gathered. These waters belong to no one until they are collected, and they may be appropriated by the one who collects and puts them to use.⁹

But though neither proprietor has such a right in or control over the water as will enable him to complain of his neighbor's appropriation, does not each owe to the other certain duties of good neighborhood, among which is the duty to abstain from purposely withdrawing the water that may be useful to both, when a use of it is not intended? Conceding that he may collect it for use, does this entitle him to do so not for use but of malice? If he sinks a well to supply his house or water his stock, it must be admitted that no question can be raised whether this is or is not a reasonable appropriation of the water; but if he digs a hole to injure his neighbor, it is not perceived that the two cases are necessarily to be governed by the same rule. What is a man's right in respect to the water percolating through his soil? The just answer seems to be this: It is a right to gather and appropriate it to his lawful uses. When he does this, he is exercising his right, and his motive is not open to enquiry. But when he collects it, not for use but to injure his neighbor, he exceeds his right, and there is that conjunction of wrong and injury which constitute a tort and will support an action.

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VII. BOOK REVIEWS.

THE REFORMED PROCEDURE.

REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTOIN ACCORDING TO THE REFORMED AMERICAN PROCEDURE. A treatise adapted to use in all the States and Territories where that system prevails. By JOHN NORTON POMEROY, LL. D., author of "An Introduction to Municipal Law," "An Introduction to Constitutional Law," etc. Boston: Little, Brown, & Co. 1876.

It is over twenty-six years since what is commonly called the code procedure was first adopted in New York; it spread rapidly through the leading middle states, and the New York statutory provisions, with few changes, have been adopted in Ohio, Indiana, Kentucky, Wisconsin, Missouri, Arkansas, Iowa, Minnesota, Kansas, Nebraska, North Carolina, South Carolina, Florida, California, Oregon, Nevada, and in all the territories except Colorado and New Mexico. The most radical feature in the new system, the blending of the old legal and equitable actions, has been left out in Kentucky, Arkansas, Iowa and Oregon, although, in those states, the equity practice is greatly modified; and in the United States circuit courts, which are required to adopt the local procedure, the old bill in chancery is tenderly preserved. This is supposed to be required from the fact that the Federal constitution gives them equity jurisdiction, and it is said that they must hence retain substantially the equity practice. In none of the code states are the equity remedies denied. Issues in equity causes are still submitted to the court, and it would seem that a change in the *form* of the proceeding, and in the mode of submitting evidence, would hardly be a denial of the jurisdiction. The Continental system of Louisiana, and the modified common law system of Texas, Tennessee, and a few other states, although great departures from the old practice, cannot be classed with that of New York.

As was to have been expected, though doubtless to a greater extent than the original codifiers anticipated, great confusion arose in the common law courts in regard to the interpretation of the

various provisions of the new statutes. The judges and the lawyers had all been trained in the common law school ; its system of pleadings, the most artificial the world has ever known, had come to be looked upon as the perfection of logical statement ; its technicalities and even its fictions had so thoroughly taken possession of the mind as to be regarded as part of the law of remedy—they were always upon the tongue and were a guide to thought ; the new terminology was strange, and seemed as barbarous as does that of the common law to the classical student before his tastes have been drowned, and it has not yet supplanted the old ; the fact that all men travel more or less in grooves, that they feel lost and are frightened when they find themselves out of the accustomed road, with all their pride, that they trust far less to reason than to tradition : these things made it impossible at once to understand and apply the new system in its full scope and with all its logical sequences. The bar looked eagerly to the courts, the courts clung timidly to the shore ; some judges were hostile, some were friendly ; the best were at a loss, and we should have gained more than we could have lost, had the decisions of the first ten years never been reported. We could never have got along at all, the system would have been abandoned before being fairly tried, had its rules been entirely new. The fact that most of them were adopted from the equity practice, caused them to be regarded as not wholly strangers, but still there was an apparent incongruity, arising more, it is true, from our habits of thought than from the nature of the proceedings, but still one that greatly disturbed us, in applying to the ordinary action rules that had been associated only with bills in chancery and their ponderous statements, and to their modes of administering relief, so utterly unlike anything known in the common law courts.

How many centuries were necessary to settle the old systems, we do not fully know ; the new is already assuming form and comeliness, but time will elapse before there will be perfect harmony in the construction and application of its rules. That time will be greatly hastened by such treatises as that of Mr. Pomeroy. Many works, more or less valuable, have been published, devoted to code pleading and practice, so-called ; some are little else than a record of decisions, others give the views of the author upon different questions, while all are moulded with reference to his locality. The only catholic work, and I may add, the only philosophic work



upon the subject is the one now before me. There are others which have great merit, but I know of no others which evince the labor, the thought manifested, in that of Mr. Pomeroy; I know of no author who undertakes, and generally with such marked success, to develop the principle which underlies and should control the decision of every question, who gives changes from the original New York code which have been made in the various states, and who so thoroughly exposes the errors of sundry courts. The writer of this article was once practically familiar with the common law system, and thought himself pretty well versed in its doctrines; he had for several years given special attention to the new system, and, for purposes of instruction, had taken full notes upon all its peculiar features; he had become painfully impressed with the confusion in the reported cases, with the fact that the system had been marred by qualifications and interpolations springing from the previous conceptions of judges, and especially with the fact that in some particulars he himself had been greatly at fault, and he supposed that he had become able to correct the errors into which he and others had fallen. But a perusal of Mr. Pomeroy's work showed him that, upon this subject, there were some things yet to be learned, and it was with keen delight that he went through its eloquent pages, saw his impressions upon many points so confirmed as no longer to leave room for doubt, and saw other points, hitherto deemed obscure or doubtful, made almost as plain. Mr. Pomeroy is always positive, yet he never dogmatizes. He sometimes gives decisions without comment, but his general method is, and he follows it upon all important questions, to give, and sometimes with exuberant fullness, the reasons for his conclusions, the principles upon which he bases them, and especially when he finds them differing from those of the courts.

Several of the reviewers who notice the work speak of it as a hand-book of pleading, and the author himself so designates it; it is much more than a hand-book. It is not a book to lie by the pleader, to be caught up in a hurry to aid him in drawing a pleading; it has no forms and does not abound in specific directions in regard to the statement in particular classes of actions, but its office is higher and more important. The author's object seems to be to possess the student so thoroughly with the principles of pleading under the system which he discusses, that he will need no hand-book, at least so far as regards the changes made by the code. The abolition of the distinction between legal and equitable actions,

the substitution of the one civil action by means of which the parties can obtain every remedy authorized by law, the author calls the central conception of the reformed procedure ; its scope and effect are ably and exhaustively discussed, and he satisfactorily shows that the chief blunders of the courts have been committed because they did not appreciate this conception. To the important subject of parties to actions he devotes over three hundred pages, and it is considered more especially with reference to the scope of the application of the rules derived from the equity practice. In discussing the subject of joinder of causes of action, to which he gives some sixty pages, special attention is given to the meaning of certain comprehensive but somewhat obscure statutory phrases of great importance to be understood, and especially of the phrase "cause of action," the misunderstanding of which has caused so many blunders. The import of the term "subject of action," as controlling the first class of causes of action which may be united in one complaint or petition, is also very ably discussed, and more satisfactorily than where the same phrase comes up again to be considered in measuring the authority of a defendant to present counterclaims.

To the general principles and rules of pleading, including the form of the complaint or petition, and election between actions, the author devotes less than one hundred pages, too small a space if we consider the fullness of the author's style, the many questions involved, and when we compare it with that given to other subjects ; but he seems to pass over no matter in respect to which the code has made specific provisions, and the leading points in regard to the statement are discussed with characteristic thoroughness. He dwells with emphasis upon the requirement to look to the code alone for the rules of pleading, very justly deprecates the inclination so often manifested to hang on to the fictions and some of the artificial rules of the common law pleaders, and labors to show that it embodies a new system, and is not an amendment merely of the old.

That the code creates a new system of pleading is true, and yet the statement is misleading. To illustrate : but a few paragraphs are given in the code in regard to parties to actions, and yet there is very little in the old books upon the subject that may not be studied with profit. Suits must be presented in the name of the real party in interest, except trustees, etc., but who has such an interest in, or who holds such a trust relation to the matter in controversy

as to authorize him to invoke the interposition of the state for his protection, is often very difficult to decide. And as to joinder of parties, those who have an interest in the subject of the action and in the relief may be joined as plaintiffs, and those who are united in interest must be so joined ; it takes but a few words to say that ; and yet they open the whole field of common interests and joint interests, with the permission in the one case given by the old equity rules to protect common interests by a single action instead of requiring many suits, and the imperative requirement in the other that all who are jointly interested shall join in the action. These are no new rules ; they are in the code, but they have been acted upon for centuries, and we may—and must if we would understand them—see how they have been interpreted and applied as well before as since the adoption of the new system. Story's Equity Pleadings is as useful as ever, and much, perhaps most, that has been written in regard to parties in legal actions, applies as well to the new procedure. And the same thing may be said in regard to the statement. The requirement that it shall contain, in plain and concise language, a statement of the facts which constitute the cause of action, without repetition, seems very simple. It could not be expressed in language clearer or more comprehensive, and nearly all the rules of statement subsequently given are designed either to provide remedies for its infringement, or as to some classes of facts, to guard against the minuter and tedious modes of statement that had before been followed, and, as to others, against their loose generality. This rule of statement embodies the *theory* of the common law pleader, and yet it had become so buried under the rubbish of fiction and mere forms that it looks like something quite new. With the preceding clauses abolishing the names and forms of actions, and the distinction in pleading between actions at law and suits in equity, it forms the gist, and embodies the controlling idea of the whole system, and it is wonderful how the original codifiers, buried over the eyes in the fictions, the technics, and artificial learning of the old system, could have so cleared their eye-sight as, through the venerated smoke and dust, to be able to see the true theory, and to express it in words so simple and yet so comprehensive. It may be well said that the code is all-controlling, that we are not to look elsewhere for a guide, when it contains a simple rule of statement that includes in its comprehensive grasp nearly every other known to the theory of pleading. The authors of our treatises upon common law plead-

ing give their best pages to the illustration of the true theory, and often seem to be trying to smother an annoying consciousness of the great departure in practice, by dwelling upon its ideal character; and in some forms of action in which the theory of statement was pretty well adhered to by the courts, the rules given by them, which are not of a mere formal character, are still sound rules of statement, and serve to apply to particular cases the very general one above given. The code pleader will do well to understand these rules, and Mr. Pomeroy cannot intend to be understood as holding them to be entirely obsolete. They are rules of logic and rules of law, and none the less so because found in treatises upon a system of pleading that has been superseded. They are rules of logic because every statement of facts constituting a cause of action implies the premise which gives the principles of law upon which it is based and which is traversed by the general demurrer, and also because the statement must be of such facts as are issuable, that is, are material, the traverse of which will involve the merits of the controversy, and of which a denial, or a confession and avoidance, will raise a material, and not a side issue. They are rules of law because the law of liability decides what facts will create it, the bearing, in addition to the main charge, of the questions of title, of privity, of the right to appear in the particular case, of consideration, etc., etc., what the court will judicially know, and what facts are presumed and therefore should not be stated; and this law of liability and the whole law of remedy, aside from the mode of seeking it, remain unchanged. Careful students of the old systems need not be reminded of the many rules of pleading that were not technical nor artificial, that were not rules of statement merely, but were rules of law that control the old, and, to a fuller extent, the new statement.

I have alluded to the fact that the author—and in that is the chief value of the book—has exposed many of the fallacies which abound in the reasoning of the judges who have but partially appreciated the scope of the code provisions. We have constantly found ourselves clogged and fettered by our traditions; our minds are cramped by common law notions that have no foundation in fact, and we have found it most difficult to apply to common law actions, that is to actions for the recovery of money only or of specific property, the rules that have long been applied, and are considered perfectly proper in equitable proceedings. Among these notions

is one concerning joint rights and joint obligations, a notion difficult to define, but fruitful in consequences to pleadings and practice. Anciently the notion was real, it embodied a fact and not a fancy, and it continues to be a reality as applied to joint tenants of real property, and to obligations to trustees. All obligations to one or more, unless the contrary intention was clearly shown, created a joint right in the obligees, a single indivisible right, in which no one could have a distinct personal interest, a right which survived to the last survivor and his representative, and in which the representatives of the co-obligees who had before died had no interest, either joint or otherwise. And so with the obligors. A joint obligation, an obligation in which two or more united without providing that it should be several, was a single obligation, must be prosecuted against all or none, continued only against the survivors and the representatives of the last survivor, the estates of all who had previously died being wholly exonerated. Such is said to be the old law in regard to the rights of joint obligees, and the liability of joint obligors. Keeping this in view, the common law practice is inevitable. All the joint obligees must unite in the action, for there is but one indivisible interest and it takes all to represent that interest. The representatives of a deceased co-obligee should not unite with the survivors, for the interest of the decedent is destroyed by death. All the joint obligors must be sued, for the obligation is single ; no one obligor is chargeable with the debt, nor with any part of it ; there is no obligation except as against the whole, and the attendant doctrine of survivorship discharges the dead, and permits the obligee to follow only the living. Hence the obligation survived against the last survivor only. The courts of equity, which did so much to civilize the common law, interfered to remedy the gross injustice by compelling surviving obligees, or the representatives of the last surviving obligee, to account to the representatives of the co-obligees, and also subjected the representatives of deceased co-obligors to the proportionate liability of the decedent. And the doctrine established by the courts of equity destroyed the whole theory of survivorship as a fact, but left it in the common law courts, in full force as a form, and as a form merely. Thus when the courts continue to say that a right is joint only, they do not mean it, for every obligee has a personal interest in it, has a share which the law will give him, and if he dies, his representatives are entitled to that share ; and so with liabilities, not only of survivors, but of the representatives of decedent obligors.

Before showing the effect of the code upon this common law form, a class of contracts should be noted in which the idea of a joint right or a joint obligation is not a fiction, but a fact so far as the particular contract is concerned. I refer to obligations given to parties as such, and the distinction in principle between this class and ordinary joint obligees has not been sufficiently noted. In an obligation given to a partnership the individual interest of the partners is not in the obligation itself, only in the general partnership fund, in the capital and profits of the firm. The obligation is collected, not for the use of the individual; he cannot either at law or equity recover his share, he has indeed no share, for the amount collected belongs to the general fund. In this class of contracts the doctrine of survivorship is no fiction, but a fact, though a representative survivorship, and not an absolute right, the law authorizing the survivor or survivors to collect all obligations for the benefit of the general fund. The distinction between partnership and ordinary joint liabilities is less marked, inasmuch as every partner is personally liable; yet it is the duty of the surviving partners, in administering the partnership estate, to provide for all liabilities from the partnership fund. In a word, the survivors are the administrators of the partnership estate, and the account between the members of the firm, is not to adjust the interest of the living member, or the representative of a deceased one in any specific contract, only in the general fund. Thus there was some reason why the surviving partners should alone be plaintiffs, and in partnership obligations, if the creditor sought satisfaction from the partnership fund alone, the same reason would require him to sue the survivors only.

The subject of joint rights and liabilities becomes material to be considered in reference to the scope of certain code provisions in regard to parties. It is provided, first, that "all persons having an interest in the subject of the action, and in obtaining the relief may be joined as plaintiffs. This was a rule of equity practice; the joinder was permissive, not imperative; and the permission was broad enough to contain those who had but a common interest, as distinguished from one that was joint. This, though an equity rule, is conceded to be now applicable to actions formerly called legal; thus, two or more persons severally and unequally interested in the condition of a bond, are permitted to join in an action upon it, although it was inadmissible under the old practice. The other is the imperative rule, that is, that "of the parties to the action, those

who are united in interest (that is, those who have the same interest or are under the same liability) *must* be joined as plaintiffs or defendants." Thus far the rule seems plain. It cannot mean all who have a like and similar interest, but the interest or liability must be the same. Thus, if the owners of specific property would protect it from injury, all the owners must join, and so of the owners of an obligation to be enforced. But if we look closely at the rule, note its application in equity practice from which it was taken, and the fact that it is now made a *universal* rule and applicable to all actions, that the distinction between legal and equitable actions is abolished, and that all actions must be brought in the name of the real party in interest, we have the instrument which utterly destroys the whole doctrine of survivorship, except as the survivor may act in whole or in part in a representative capacity. The administrator of a deceased joint obligee is as much interested in the recovery of a debt as the survivor; he is "united in interest" with the survivor; under the equity practice he "must be joined" with the survivor; he and the survivor are the "real parties in interest." And so with the obligors; death does not release a joint obligation entered into in one's own right.

The last rule, as given, contains but a portion of the paragraph, and following is a provision conforming still further to the equity practice, that puts it out of the power of one obligee, perhaps by collusion, perhaps for favor, to prevent the enforcement of the obligation by his co-obligee. It is as follows: "But if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the petition." I assume that this clause refers to all actions, to legal actions, including actions to collect money upon obligations to two or more, as well as to equitable proceedings, although it is otherwise claimed, and the Supreme Court of Missouri in two decisions supports the claim. (*Clark v. Cobb*, 21 Mo. 223; *Raines v. Smizer*, 28 Mo. 310.) The opinions in both cases were delivered by Judge Scott, who, with some force, claims in effect that to allow one obligee to enforce the obligation against the will of the other would change the law of liability by changing the equal rights of the parties in relation to its enforcement, which the code does not attempt to do. But is not this a begging of the question? If the code extends this equity rule to all parties, it does give the plaintiff a *remedy* which he could not before have had in a money action, but it gives him no new interest. If he was before entitled to one-

third or one-half of the proceeds of the obligation, his share is not increased ; he may obtain it more readily but he cannot hold more than his own. The truth is, this clause and the one preceding strip off the sacred vestments and profane one of the idols we learned to worship at the very beginning of our legal course, and which we find it difficult to look upon as a mere idol. Lord Bacon, in finding it necessary to overthrow the idols of the theatre, the idols of the market and the idols of the forum, before the human mind could be emancipated from the dominion of the false gods of science, was not more of an iconoclast than those who have been engaged during the present generation in rationalizing our worship at the altars of the common law.

I have referred to a few important phrases, the meaning of which the author discusses at length, among which is "cause of action." The petition must state the facts which constitute a cause of action, a demurrer will lie if it does not do so, and one is permitted to unite in one petition different causes of action. The import of the phrase, and especially in deciding upon the union of causes, must be understood, and yet there has been more cloudiness upon this subject than perhaps upon any other. The writer feels under special obligation to the author for exposing some fallacies into which he had been betrayed, under which, in a class of cases, he had confounded the remedy with a cause of action, treating a new and additional remedy merely as a new cause. Mr. Pomeroy gives an analysis of what the statement in every good petition must import and contain, independent of the relief demanded, under which it is easy to decide whether an additional statement would contain an additional cause of action, or is merely a restatement of the one already given. He elaborates the idea in different parts of his work, as its consideration is called for in different connections, but perhaps an extract from sections 453-4 will sufficiently indicate the author's theory.

"Every action is brought in order to obtain some particular result, which we term the *remedy*, which the code calls the "relief," and which, when granted, is summed up or embodied in the judgment of the court. The result is not the "cause of action" as that term is used in the codes. It is true this final result, or rather the desire of obtaining it, is the primary motive which acts upon the will of the plaintiff, and impels him to commence the proceeding, and in the metaphysical sense it can properly be called the

cause of this action, but it is certainly not so in the legal sense of the phrase. This final result is the "object of the action" as that term is frequently used in the codes and in modern legal terminology. It was shown in the opening paragraphs of the introductory chapter that every remedial right arises out of an antecedent primary right and corresponding duty, and a delict or breach of such primary right or duty by the person on whom the duty rests. Every judicial action must therefore involve the following elements: a primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff and a remedial duty resting on the defendant springing from this delict, and finally the remedy or relief itself. Every action, however complicated or however simple, must contain these essential elements. Of these elements the primary right and duty and the delict and wrong combined, constitute the cause of action in the legal sense of the term, and as it is used in the codes of the several states. They are the legal cause or foundation whence the right of action springs, this right of action being identical with the "remedial right" as designated in my analysis. In accordance with the principles of pleading adopted in the new American system, the existence of a legal right in an abstract form is never alleged by the plaintiff; but instead thereof the facts from which that right arises are set forth, and the right itself is inferred therefrom. The cause of action, as it appears in the complaint when properly pleaded, will therefore always be the facts from which the plaintiffs' primary right and the defendants' corresponding primary duty have arisen, together with the facts which constitute the defendants' delict or act of wrong.

"The cause of action thus defined is plainly different from the remedial right, and from the remedy or relief itself. The remedial right is the consequence, the secondary right which springs into being from the breach of the plaintiff's primary right by the defendant's wrong, while the remedy is the consummation or satisfaction of this remedial right. From one cause of action, that is from one primary right and one delict being a breach thereof, it is possible, and not at all uncommon, that two or more remedial rights may arise, and therefore two or more different kinds of relief answering to these separate remedial rights. This is especially so where one remedial right and corresponding relief are legal, and

the other equitable ; but it is not confined to such cases. One or two very familiar examples will sufficiently illustrate this statement, and will show the necessity, as well as the ease of discriminating between the cause of action and the remedy. Let the facts which constitute the plaintiff's primary right be a contract duly entered into by which the defendant agreed to convey to the plaintiff a parcel of land, and full payment by the plaintiff of the stipulated price, and performance of all other stipulations on his part. Let the delict be a refusal by the defendant to perform on his part. This is the cause of action, and it is plainly single. From it there arise two remedial rights and two corresponding kinds of relief; namely, the remedial right to a compensation in damages; and the remedial right to an actual performance of the agreement, and the relief of an execution and delivery of the deed of conveyance. If the plaintiff in an action should state the foregoing facts, constituting his cause of action, and should demand judgment in the alternative either for damages or specific performance, he would, as the analysis above given conclusively shows, have alleged but one cause of action, although the reliefs prayed for would be distinct, and would have belonged under the old system to different forums—the common law and equity courts.”

These alternative remedies are only given by the author as an illustration. Two or more remedies may be given in the same cause, sometimes all legal, as possession of real property with rents and profits and damages, sometimes all equitable, and often both legal and equitable. It is in the last class of cases, where both a legal and equitable remedy is sought, that it has been often supposed that there were two or more causes of action, and so the supreme court of Wisconsin seems to hold, and so, for several years, did that of Missouri. In cases where one remedy grows out of the other, when at the commencement of the action the plaintiff was not in condition to seek one kind of relief until the court had first removed some obstruction, or placed him in condition to be entitled to it, it cannot be pretended that he had an independent right to the last remedy at the commencement of the suit. The most common case is where one seeks a reformation of a contract, and its enforcement as reformed. The New York courts call this a single cause of action, while those of Wisconsin make them two, one for the reformation and one for the judgment upon it. Aside from the fact, inconsistent with this idea, that there is but one delict or wrong, according to the analysis of Mr. Pomeroy, we have

the further fact that if there are two causes of action, they should, if presented together, be separately stated, and that each statement will contain, in and of itself, a complete cause, and one triable alone, if the other were struck out of the petition. But the contract unreformed shows no obligation; there can be no delict or breach; and hence a statement based upon it, as actually written does not contain facts that constitute a cause of action. But in another class of cases where there is a perfect money demand and also a right to a remedy other than a money judgment, as when, in addition to the money claim, there is a lien upon property, here it has been supposed there are two causes of action, one for the personal judgment and one for the order enforcing the lien. But in the light of the analysis of Mr. Pomeroy, or of any other of a similar character, there can be even in this case but one. There is but one primary right and that is a right to the money due; there is but one wrong and that is the refusal to pay it. The right to the personal judgment and its execution, and to the order of sale, are both remedial rights; the court will give such judgment and such order, each because of and as a relief from the consequences of the one wrong. The paragraphs above given from Mr. Pomeroy would be more readily comprehended, if we had room for the first few pages of his introduction, where the distinction between primary and remedial rights is very clearly illustrated.

Perhaps another statement may be made in regard to the import of the phrase, a little more simple and more easily understood by those who are unaccustomed to forms of abstract scientific statement, although substantially the same as that of Mr. Pomeroy. A cause of action may be said to be a legal wrong committed or threatened by the defendant against the plaintiff, and a good petition will state facts showing such wrong, that is, "facts that constitute a cause of action." This wrong of course implies a right, for it is the infringement of a right, and the right must appear or there is no wrong. In most actions the facts showing the right must be affirmatively pleaded, while in some, as for most personal injuries, the right is incident to our existence, and no facts need be stated to show it. Thus, the right to exemption from injury to person or character cannot be made plainer by the pleader than it is universally conceded to be, and the cause of action is complete by simply showing an infringement, a beating, or words published concerning the plaintiff imputing the commission of a crime. But in case of an alleged breach of contract, an obligatory agreement

must appear together with such other facts, as the performance of the conditions precedent, or the plaintiff's title if not an original party, as will show the plaintiff's right to insist upon its performance, and make the defendant's refusal a wrong. Sometimes this statement is very simple, and sometimes, especially in some equity rights, it may be very complicated; but it can show nothing more than that the defendant has been guilty of a wrong; sometimes by the omission of a duty in its more restricted sense, as by negligence where care is required; sometimes by refusing to respond to the obligations of a contract; sometimes by contrivances by which one is induced to part with his property or assume an obligation; sometimes by disturbing one's dominion over his property, and sometimes by interfering with his right to the services of another; and in all these cases, and in all others, except where the right arises from the fact of existence, the wrong can only be made to appear by a statement of facts which show the duty, the contract, the contrivances, the title to the property, the right to the service, etc., etc. Every statement also implies a proposition of law, which, to put the matter in the usual dialectic form, may be called the first premise or member of the syllogism. This proposition is never stated, but it is just as emphatically a part of the petition as though spread out upon paper, and is almost as frequently traversed as the statement itself. It is traversed, put in issue, denied by the general demurrer, just as the statement, or second premise, is traversed by denying the material facts which it embodies. As resulting from this statement and by virtue of this proposition of law, the plaintiff is entitled to a remedy, for where there is a wrong there is a remedy, and in torts, an injury for which the law gives no remedy is called *damnum absque injuria*, an injury without a wrong.

The plaintiff is entitled to a remedy, and the remedy follows the facts stated and the proposition of law involved, and he may so state the facts that they will authorize all the remedies to which he may be entitled, that is, he may make a full statement of the facts, or, when the wrong is the same, he may state only part of the facts, and such as shall entitle him to one of the remedies. Thus, one holds a promissory note given for the purchase-money of land, or secured by mortgage upon land; he may simply put the note in suit, saying nothing about the consideration, or the security, or he may state the additional fact which charges the land. In either case the wrong is the same, but the statement must not only

show a wrong but one for which the law gives a remedy, and the remedy which the plaintiff seeks. In the one case he seeks and obtains an ordinary personal judgment; in the other he not only shows himself entitled to this judgment, but also to one broad enough to specially charge the land. Are there in this case two causes of action? It has frequently been so said, and the writer had heretofore adopted that view, assuming, in order to obtain a full remedy, that there should be a joinder of the two causes of action by separate statements, one being for the personal judgment and the other for the enforcement of the lien. But it would seem plain that the two statements were but separate applications for the two remedies for the one wrong, which is the refusal to pay the money; that the additional count states no wrong nor any new right, except the right to another remedy. Color was given to the claim that the causes of action were two, because two actions would formerly lie and were sometimes necessary in order to obtain the full relief. Because two actions would lie it was hence inferred that there were two causes of action, when in fact each was founded upon the same cause; one seeking legal relief and the other equitable, a full satisfaction in one extinguishing the other.

“Subject of the action” is another phrase of still more obscurity, although it has given rise to less contention, for the reason that no interpretation will operate to impale any long cherished theory. It is prominently used in two connections, although it is found elsewhere. The first class of causes of action that may be united in one petition embraces those which arise out of “the same transaction or transactions in connection with the same *subject of action*,” and a counterclaim may be “a cause of action arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff’s claim, or connected with the *subject of the action*.” It is seldom that more than one cause of action will arise out of the same transaction, a broader term than a contract and may mean any act which involves, or from which may spring, a wrong, an infringement of some legal right; but different transactions may be connected with the same subject of action from which different causes of action may arise. In deciding, then, as to their union, it becomes very important to understand what is meant by the term “subject of action,” to know whether it forms such a link between these transactions as to authorize a settlement in one action of all the controversies that may have grown out of them. Upon this subject the author speaks with

his usual clearness and force, and I ask special attention to the following extract from section 475, inasmuch as, in a subsequent part of his work, there is a *seeming* departure from the interpretation here given.

“ The same analysis applies also to the remaining portion of the clause, the sole difference being that the causes of action **arise** out of different transactions instead of one. The common tie between the causes of action in that case is, that the **transactions** themselves are connected with the same ‘subject of **action.**’ What is meant by this term? It cannot be synonymous with ‘cause of action.’ This appears from making the **substitution**, since the result would be, ‘causes of action may be united when they arise out of transactions connected with the same **cause** of action,’ which is an absurdity, a mere statement in a circle. ‘Subject of action,’ therefore, must be something **different** from ‘cause of action.’ It is also different from ‘object of the **action.**’ The object of the action is the thing sought to be attained by the action, the remedy demanded and finally awarded to the **plaintiff**. Causes of action cannot arise out of transactions connected with the ‘object of the action,’ because that object is something in the future, and could have no being when the transactions **took** place out of which the causes of action arose. As the causes of action arise out of certain transactions, and as those transactions **are** connected with a ‘subject of action,’ it is plain that this subject must be in existence simultaneously with the transactions themselves, and prior to the time when the causes of action commence. This fact also shows that the subject must be something other **than** the cause of action. The phrase was not used in legal terminology prior to the code, but another one, very similar to it, was in constant use, and had acquired a well defined meaning, namely, ‘*subject-matter of the action.*’ Thus the rule is familiar that courts must have jurisdiction of ‘the subject-matter of the **action**’ as well as over the parties. Courts might have the power in a proper case to grant any kind of relief, legal or equitable, and to **enter**tain any form of proceeding, and yet not have jurisdiction over some particular ‘subject-matter.’ The term ‘subject of **action,**’ found in the code in this and one or two other sections, was doubtless employed by its authors and the legislature as synonymous with, or rather in the place of ‘subject-matter of the **action.**’ I can conceive of no other interpretation which will apply to the phrase and meet all the requirements of the context. ‘Subject-mat-

ter of the action' is not the 'cause of action,' nor the 'object of the action.' It rather describes the physical facts, the things real or personal, the money, lands, chattels, and the like, in relation to which the suit is prosecuted. It is possible, therefore, that several different 'transactions' should have a connection with this 'subject-matter,' or what seems to me to be the same thing, with this 'subject of action.' The whole passage is, at best, a difficult one to construe in such manner that any explicit and definite rule can be extracted from it."

This statement of the author's view is very clear and emphatic; but when the same phrase is again considered, it seems to be somewhat modified. In speaking of counterclaims and after referring to the opinion in *Xenia Br. Bk. v. Lee*, (7 Abb. Pr. 372) Mr. Pomeroy, in section 775 says:

"It would, as it seems to me, be correct to say in all cases, legal or equitable, that the subject of the action is the plaintiff's *primary right* which has been broken, and by means of whose right a remedial right arises. Thus the right of property and possession, ejectment and replevin, the right of possession in trover or trespass, the right to the money in all cases of debt, and the like, would be the 'subject' of the respective actions. Although in a certain sense, and in some classes of suits, the things themselves, the lands or chattels may be regarded as the 'subject,' and are sometimes spoken of as such, yet this cannot be true in all cases; for in many actions there is no such specific thing in controversy over which a right of property exists. The primary right, however, always exists, and is always the very central element of the controversy around which all the other elements are grouped, and to which they are subordinate. In possessory and proprietary actions this right which will then be always one of property or of possession, will be intimately associated with the specific thing itself which is the object of the right, but this relation is not and cannot be universal. It seems, therefore, more in accordance with the nature of actions and more in harmony with the language of the statute to regard 'the subject of the action' as denoting the plaintiff's *principal primary right* to enforce and maintain which the action is brought, than to regard it as denoting the specific thing in regard to which the legal controversy is carried on. In this manner alone can we arrive at a *general* rule applicable to all possible cases, and the rule thus reached fully satisfies all the requirements of the legislative language, and can be invoked in all classes of actions."

There is no direct antagonism between the views expressed in these two extracts, but it is evident that the thoughts of the author were running in different channels, though in the same direction.

The subject of the action must be the matter in respect to which the action is prosecuted ; the property only, if the action be for its possession only ; also the property, if the action be to enforce or rescind a contract in respect to property ; generally in actions upon contract, the subject-matter of the contract ; the character, in slander ; the beating, in assault and battery ; the restraint, in false imprisonment, etc. There can be no subject of action without a supposed cause of action, and no cause of action without an assumed primary right in the plaintiff as well as a wrong committed by the defendant ; but what light do we get by saying that the subject of the action is the primary right ? The object of a definition is to enlighten ; it should not only give the general, from which we can draw the particulars, and be so general as to comprehend every particular, but it should not be attempted unless it is so suggestive as to throw light upon the subject, and its pertinency is obvious to the common apprehension. It may be easy to say what is the subject of a given action ; but the causes of action are so various, covering every variety of subject and involving all the wrongs of which the law takes notice, that it would be exceedingly difficult, I should think impossible, to describe "the subject of an action" by general terms that apply to them all ; and saying something in regard to it, although true and of general application, is not necessarily a definition. Every action implies a right to be vindicated and a wrong to be redressed ; the *object* of the action is to vindicate the right by redressing the wrong ; that in regard to which the right exists and the wrong has been done would seem to be the *subject* of the action. The extract first given takes this view, and its correctness is admitted in the second with regard to proprietary rights ; but inasmuch as actions do not always pertain to property rights in things tangible or remedial, the author falls back upon the right itself. But whether a right of property, as limited to ownership of things, is involved or not, there is always something concerning which the suit is brought, and in respect to which the wrong is done. Thus, in slander, the publishing the words, as "he is a thief," is the wrong done, and in respect to the plaintiff's character. His character there is the *subject* of the action. The plaintiff has a right to his good name ; that right does not depend, in the given case, upon any facts stated in

the pleading ; it arises from his very existence and is not a matter of controversy ; but the controversy is, first as to whether the words have been published concerning the plaintiff, and if so, whether the act was justifiable. But what is its subject-matter ? The plaintiff's right ? no, for that is not disputed ; nothing is said in the pleadings about it ; no question is raised in regard to it ; but the controversy, though directly in regard to the injury, pertains to, is in respect to, his character, his property, so to speak, which has been trespassed upon. The subject of the action varies, as I have said, with the nature of the injury. In trespass for false imprisonment, there is nothing tangible, or ideal even, to be seized hold of separate from the right and the injury. The plaintiff has a right to personal freedom, but there is no controversy in regard to that right. In this instance more than in any other, it looks as though this right might be the matter in respect to which the controversy arose. But the wrong complained of, to redress which the suit is brought, is the infringement of that right, and with greater reason it may be said that the subject of the action is the restraint itself, the fact that the plaintiff was imprisoned. The defendant may justify under warrant, and, if so, the justification is new matter of defence, and its subject is the warrant. From the nature of our system we can have no authoritative judicial essay that can apply to all classes of actions, but the general scope of the highest judicial opinion has been in harmony with the view here taken.

Passing over other points which my space will not permit me to notice, I can but congratulate the profession upon the publication of this work, and the author upon his success. If I could bring my mind to criticise, I might say that the style is a little too exuberant for old fashioned tastes. It is difficult, nay, it is impossible, to lay down any general rule in regard to style, except to say, that the author's idea should be clearly expressed and in good English—every one must prophesy according to the gift that is within him—but in reading this book, along with the pleasure which its discussions have given me, I have occasionally felt that I was too long delayed by introductory matter, that repetitions sometimes were made which could have been saved by reference to previous pages, and that sometimes well rounded sentences could be shortened by the use of technical terms ; I have been reminded of the old bill in chancery without its technics, as presented by an able and enthusiastic equity pleader.

P. B.

ST. LOUIS, June 1, 1876.

A COMMENTARY ON THE LAW OF AGENCY AND AGENTS. By FRANCIS WHARTON, LL.D., Author of Treatises on "Negligence," "Conflict of Laws," "Criminal Law," etc. Philadelphia: Kay & Bro. 1876.

It is now nearly forty years since Mr. Justice Story's work on the Law of Agency was given to the world ; since which time it has remained an acknowledged standard for the bench and bar both in this country and England. The period is a pretty long one for this age of rapid change. The treatise of Story has usually been regarded as the best of all those with which he endowed the profession. We may esteem it as fortunate that the work of re-writing this branch of the law has been undertaken by Dr. Wharton, who has a high reputation to maintain, and who possesses very special qualifications for the task.

No doubt the name of Story and the excellence of his commentaries have repelled many writers who were looking about for a subject. This department of the law is one that might well serve to attract, and at the same time to warn off, the average compiler of text books. There is a symmetry about the law of agency, as well as about the kindred subject of bailments, that renders it peculiarly susceptible of accurate, methodical and scientific treatment ; but this very circumstance tends to render any fault or defect in its development the more marked and conspicuous. There are but few branches of the law more frequently in practical requisition than that of agency. It sheds light on many relationships not usually treated of under that head. It has been a favorite subject of reflection with jurists of the most commanding eminence ; and it has been built into a system with less of conflict of authority than is generally to be found in legal subjects of similar scope and importance. The adjudications have multiplied here as elsewhere with the rapidity that characterizes the present era of the law. The plan of the author has been to collect all the cases which have occurred to his reading. Consequently his notes are very numerous ; and are sufficiently disheartening to anyone who would desire to study the subject from the original materials which the author has laid under contribution. On this point the author says in his preface : "In collecting American authorities, I have thought it advisable to introduce all reported judicial decisions, no matter how cumulative, which have come to my notice in connection with the topics discussed. No doubt in this way my notes may appear overloaded, and my table of cases redundant ; but it must be recol-

lected that agency is the creature of usage as established by the courts; that usage can only be settled by cumulative rulings; and that under our American system, there is no state whose adjudications can be safely omitted in such a commentary as the present."

We think that herein the author has pursued the better course. He might have added another consideration of great weight. The practicing lawyer needs something more than statements of general principles; he often needs also to be enabled to show how these principles have been applied. In the common case of competing analogies, this is frequently of the utmost importance; and it hardly seems fair for a law writer to lay down principles, leaving it to the reader to search through the digests and reports for illustrations of their application. The cases referred to in the notes often explain a great deal more than is stated, or can be stated, in the brief limits of the text. Not unusually principles are admitted on all sides; but there still remains a serious and rational controversy as to the manner of their adjustment to the particular case in hand. Every lawyer knows that decisions commonly thought to be unimportant sometimes come to have a great practical value. It is very true that in carrying out this plan the notes of the present treatise form an extensive deposit beneath the text. The author cites about three times as many cases as are referred to in the third edition of Story's work on the same subject. This is very striking evidence of the rapid expansion of the law and its literature, and it suggests that the course here adopted will before a great while become impracticable, however desirable it may be for the present. A nice discrimination between cases which merely assert, and cases which illustrate principles will then be requisite; and the difficulties in the way of writing a good law book will be considerably increased. At present, the task of making a complete collection of the cases on this important topic of the law must be immense. The author does not pretend to have succeeded in doing so; and the reader who scrutinizes the work closely will be apt to recall cases to which the attention of the author was not directed. Nevertheless the citations are unusually full and satisfactory.

Throughout the entire work Dr. Wharton exhibits the parallels of doctrine of the common law and the civil law, and marks their chief points of difference. Perhaps no living author is so capable of doing this with perspicuity and skill. In the amplitude and number of his Latin quotations, the author rivals, and even excels, Mr. Justice Story. We doubt whether these extensive citations in the

Latin language may not rather blemish than embellish the work. Precedent may indeed justify this course ; but occasionally precedents should be revised. The custom is extremely prevalent with the German jurists, to many of whom the author makes reference. In France, where for a long time the oral discussions of lawyers were usually half in Latin, the disposition of later writers is to discard extensive citations from the Latin, under the impression that it savors of pedantry. It is a great while since the writers in the Spectator deemed it essential to prefix to every essay a Latin couplet, by way of giving the paper a good send-off. Even great scholars are not wont to converse in Greek and Latin. Porson, one of England's greatest Greek scholars, commonly read Greek authors in English translations. Long Latin quotations are unsuited to oral discussions ; being, in such case, apt to make the unskilful laugh and the judicious grieve. Wedderburn, not having received a university education, would never venture to cite a Latin poet in the House of Commons, for fear of a false quantity ; and yet he was a critical Latin scholar. It does not appear that the business of the House was seriously incommoded by his deficiencies as to poetic numbers ; and there was nothing in the circumstance that prevented him from becoming Lord Chancellor of England. It would be useless to say that the bench and bar are presumed to be perfectly familiar with the Latin language. Many of our ablest lawyers have either never had a classical education, or they have lost it amidst the absorbing duties of professional life. In a time when such men as Herbert Spencer publicly avow a total ignorance of Latin and Greek, this fact is nothing to their disparagement, if the deficiency is made up for by other acquirements. As everything in the Roman law can be readily turned into English with but little circumlocution, literal citation does not seem to be strictly necessary. The few persons who are particular about the exact language of the originals are those who have studied the originals, and for whom the literal citations are not needed. There is quite as much room for the display of an exact scholarship in giving the thoughts of the Roman writers in good English equivalents, as in making extended citations from the original language. To give the substance and spirit in an English dress might possibly be regarded as an innovation ; but if so, there is no one who could more safely make it than Dr. Wharton. For common and general use, we think that the innovation, if such it were, would be acceptable ; and that an edition of the present work strictly prepared for English

readers, would compete favorably in the market with the present one.

But as this is probably a matter of taste, we ought not perhaps to urge it further. Though the limits of the law of agency are pretty well defined, yet it passes with insensible gradations and fading lines into other branches. The law of partnership, for example, is based largely on the principles of the law of agency. For the law of agency as applied to partnership, the author refers the reader to treatises on the latter subject; and this we think wisely, as most persons would there look for that part of the law; and our law books are too numerous to justify the duplication of law under different heads. In deference to this consideration, the author has remanded the questions as to negligence mainly to his separate work on that subject. This circumstance, no doubt, mars the outline of the present treatise. It is doubtful whether a mere negative title, like that of negligence, is a proper title in the law; but it is probably too late to raise that question now, as it is certainly too late for Dr. Wharton. The course pursued in this instance had no alternative save the inadmissible one of making the profession pay twice for the same matter. These two treatises are companion volumes, and the one is the complement of the other. The two, taken together, cover a very wide range of the law, and will be found to be correspondingly useful. The present work is eminently so. It is less diffuse than that of Story, and it brings the law down to the latest dates. It will, we incline to think, be esteemed as the most valuable of all the works of this author, as it is evidently that on which he has bestowed the most care, not excepting even his laborious and profound treatise on the Conflict of Laws.

The book is a very readable one; and this is saying more than at first might be implied. There is, perhaps, as much difference in this respect in law books as in books of general literature. Some law books cannot be read for very heaviness; and hence practically very little instruction can be got out of them. It is not mere grace of style that makes a law book readable. A diffuse attempt at grace, a grasping after rhetorical utterance, is generally fatal. But that which makes a law book readable is order, method and clearness; that thorough comprehension of the subject that commands the confidence of the reader, and that alone can give unity, harmony and coherence to the work.

Besides the treatise on agency in general, the present work contains separate chapters on attorneys at law, auctioneers, bank offi-

cers, brokers, factors, salesmen and foremen, and liens of different classes of agents. The typography, paper and binding of the volume are entiled to the highest commendation.

U. M. R.

A TREATISE ON THE LAW OF NEGOTIABLE INSTRUMENTS, including Bills of Exchange, Promissory Notes, Negotiable Bonds and Coupons, Checks, Bank Notes, Certificates of Deposit, Certificates of Stock, Bills of Credit, Bills of Lading, Guaranties, Letters of Credit and Circular Notes. By JOHN W. DANIELS of the Lynchburgh, (Va.) bar. In two volumes. New York: Baker, Voorhis & Co. 1876.

The system of throwing law books together, now in vogue, admits of their production with alarming facility. A good treatise on the law of Negotiable Instruments would be the work of years of patient thought and investigation; to make even a complete digest would be no small undertaking; but the lawyers of the country have a sorrowful realization of the fact that by combining some of the elements of a treatise with a fragmentary digest of the most handy decisions, modern authors are enabled to turn out law books with great rapidity, and, unfortunately, no very serious mental strain; so that the occupation of law-book-maker has come to be regarded as a light and profitable business, and good-natured lawyers who have not learned to say no, find themselves seriously taxed to support these professional book fiends. And what makes the outlook more gloomy is the fact that the evil is evidently a growing one. Daniel on Negotiable Instruments is in the modern style. While it has a stronger dash of the elements of a treatise than some of the works of its class, it is more than ordinarily deficient as a digest. The citation of authorities, especially upon controverted questions, is comparatively meager, and there is a noticeable absence of reference to many important recent decisions. We are not prepared to say, that in a work of this character, it would be profitable to refer to all the authorities, but we think all the authorities on mooted points should be cited. Professor Parsons' work on Notes and Bills, published in 1862, refers to some three thousand more cases than are cited by Mr. Daniel.

The text of a treatise ought to formulate general principles clearly, distinctly, and analytically; and ought to trace the law of the subject under consideration from its beginning, as far as possible, showing its history and gradual development, and noting

the peculiar influences and circumstances stimulating growth or inducing change. Mere statements that this court has held this, and some other court held that, may, in general, be safely left to the notes, which should perform the office first of fortifying the text, and next of showing the exact state of the decisions on the question in all the authoritative courts. The chief distinction between the text and the notes should not consist in the size of the type, and the presence of a strong infusion of Arabic numerals. As a rule, decisions should be quoted in the text only for critical analysis and discussion, and not to fill up as, or in the place of, original matter. But if the matter that belongs more properly in the notes is injected into the body of the text we see no reason why the citations of authorities should not be also incorporated therewith, unless excluded as a matter of economy, in cases where the body of the work is printed in type large enough for a modest circus poster, as this is. Without attempting to particularize, it may be said that this new candidate for favor possesses in a greater or less degree the general faults of its class.

The mechanical execution of the work is fair, but not first-class. The letter-press is especially poor. There is too much ink on some of the pages and too little on others. The type is large and full-faced but the impression is not clear. We believe Mr. Daniel's publishers have a weakness for large type. Long Primer Roman is large enough for a law-book, and with good presswork, is not only more pleasing to the eye, but more easily read than a frowsy impression from heavy-faced Pica, as a comparison of the preface with the body of this work will very clearly show. The catch-words prefixed to the sub-sections are printed in Italics, which is much to be preferred to the unsightly black letter, much used recently for that purpose. That used in printing Cooley on Taxation may be referred to as being exceptionally ugly.

The arrangement of the work is most admirable. The two volumes are divided into six books, treating successively of the making of the instrument; who may be made parties; the negotiation of the instrument; protest and notice, and excuses for want of presentment, protest and notice; actions on negotiable instruments, and defences, discharges and damages; and the varieties of negotiable instruments other than bills and notes. These books are again divided into chapters, sections and sub-sections. There is a table of contents and an index on the plan of that in Parsons on Notes and Bills. Suggestive catch-words are prefixed to the sub-sections.

In short the work is fitted out with "all the modern improvements."

The author's style is clear and direct and there is never any doubt as to his meaning, except when he falls into contradictions by following cases that are inconsistent with each other, and that is a fault that almost necessarily attaches to the semi-digest method of book making. Such occasional expressions as "accepts to pay the bill," (§ 18,) "Operates no assignment," (§ 23,) and other inelegancies of that character, are evidencies of haste rather than a vicious style. To the same cause may be assigned the somewhat frequent mis-statement of the purport of decisions, and the less frequent mis-citation of authorities. Errors of the latter class will creep into the most carefully prepared book, but those of the former are inexcusable and should not be tolerated. Section III, (vol. 1, p. 12,) treating of the effect of a bill of exchange, and whether or not it is an assignment of the fund in the hands of the drawee, may be cited as a fair sample of the unsatisfactory and partial (in the sense of incomplete) manner in which many important questions are treated. The examination is presented under the following heads: "*First*—What is the effect of a bill of exchange (a negotiable bill in its commercial sense) drawn for the whole amount of a fund in the drawee's hands? *Second*—What is the effect of a non-negotiable order for the whole of a fund? *Third*—What is the effect of a bill of exchange for part of a fund? And *Fourth*—What is the effect of a non-negotiable order for a part of a fund?"

Under the first head it is stated that some authorities hold that a negotiable bill for the whole of a fund operates as an equitable assignment of that fund, while others hold that such a bill is simply an engagement of the drawer that the drawee shall pay the payee a certain amount, and it is added that "great confusion has arisen in the adjudicated cases from a failure to discriminate between the parties who may claim that, as to them, it operates as an assignment, and those who can make no such claim. * * * *As between the drawer and payee,* then we think it clear that the bill is intended to operate, and does operate, as an assignment of the fund in the drawee's hands sufficient to meet it. * * * *As between the payee and the drawee,* however, there is no priority of contract unless the drawee accepts to pay the bill. When he does this, he becomes absolutely bound to pay the debt to the holder of the bill. * * * *When,*

however, the drawee has not accepted or assented to pay the amount to the holder, the rights of the parties are more difficult to determine. The holder cannot sue the drawee at law in his own name, for there is no contract on the part of the drawee to pay him. But we should say that he might sue the drawee in the name of the creditor for the amount of the debt, and offer the bill in evidence to show that it had been assigned to him."

Mr. Daniel admits that "this doctrine is controverted by *some* of the authorities," and backs up the somewhat indefinite concession by citing *Bank of Commerce v. Bogy*, 44 Mo. 15; and *Harrison v. Williamson*, 2 Edw. Ch. 438; but neglects to state that they are supported by the overwhelming weight of authority both in this country and England. Nor does he say that the *nisi prius* case of *Corser v. Craig*, 1 Wash. C. C. 426, cited in support of his position has been expressly disapproved by the courts of the leading commercial states, and that its doctrine was rejected in *Mandeville v. Welsch*, 5 Wheat. 286, and *Tieman v. Jackson*, 5 Pet. 580.

The weakness of Mr. Daniel's position is elementary. An instrument drawn on a particular fund is not a bill of exchange. The only essential difference between a check and a bill of exchange is, that while on their face both are usually drawn generally and not against any particular fund, a check is presumed to be drawn against, and as an appropriation of, the whole or a part of a fund, and, from the usual course of business there is an implied promise on the part of the bank holding the fund to pay it out on checks to such person or persons as the depositor may designate. Of course there are other incidental distinctions between the two classes of paper, but they will be found on close examination to follow naturally from that referred to. A bill must be accepted because it is a mere mandate and has no direct operation on the fund itself; a check need not be accepted because it operates as an immediate appropriation of the fund, with the implied consent of the drawee, consequently no express assent is necessary. For the same reason a bill must be presented for acceptance, while a check requires only to be presented for payment. A check must be made payable immediately, because it is a present appropriation of the fund; a bill of exchange must be drawn payable at some time in the future, because it is not the present appropriation of a fund, since by it the drawer only undertakes that the drawee will on presentation enter into a contract to pay it. The drawer of a check is presumed to be the principal, because he assumes to assign his

own property, and hence the valuable consideration must necessarily move to him, and for that reason the check need not be protested; but the drawee of a bill is not presumed to be a principal, and, unless the bill was drawn wrongfully, he is entitled to notice of its dishonor.

Nor do we see the force of the distinction that a bill of exchange is an assignment as between the drawer and payee, and not as to the drawee unless accepted. An assignment that does not assign is simply no assignment.

The rule supported both by principle and authority is in accordance with that laid down in *Winter v. Drury*, 5 N. Y. 525, namely, That an unaccepted bill of exchange does not of itself give the holder, either in law or equity, a lien upon the funds of the drawer in the hands of the drawee, and that an assignment for the benefit of creditors would take precedence of such a bill. *Luff v. Pope*, 5 Hill, 413, affirmed on error, 7 Ib. 577; *Harris v. Clark*, 3 N. Y. 118; *Copperthwaite v. Sheffield*, 3 N. Y. 243; *McLoon v. Linguist*, 2 Bin. 9; *Fabers v. Welsh*, 1 Penn. L. J. Rep. 363; *Kimball v. Donald*, 20 Mo. 577; *Citizens' Bank of Louisiana v. First National Bank of New Orleans*, L. R., 6 House of Lords, 352.

An unaccepted bill must be taken on the personal credit of the drawer. *Andrews v. Harvey*, 39 Tex. 123. But after acceptance it is taken and held primarily upon the personal credit of the acceptor.

But while a bill of exchange does not, and from its very nature cannot, operate as an assignment of a fund, at least before acceptance, it, taken with other facts, may show an intention to assign the fund. If it was sufficient evidence of itself from which to find an equitable assignment, it would necessarily operate as an assignment. The question of assignment, or more properly appropriation, in such cases is purely one of intention. An intention to assign, founded upon a sufficient consideration, works at least an equitable assignment. The intention to assign the fund cannot appear upon the face of the bill without destroying its character as commercial paper, hence it must be shown *aliunde*. The "principles of good faith and fair dealing," invoked by Mr. Daniel to the support of his position are fully satisfied by this doctrine, while his doctrine would most frequently defeat the intention of the parties. But regardless of that consideration, one who takes a written obligation is presumed to accept it with notice of its legal effect. If the parties in interest desire to assign a given fund it is very easy

for them to express that intention in the contract, but if they neglect to so draw the written evidence of their contract as to express their intention, they cannot obtain equitable relief without supplementing the written evidence with other facts and circumstances entitling them to the relief sought. A written order for the whole of a fund is an assignment of the fund; if drawn for a part of the fund, it is, if founded upon a sufficient consideration, an equitable assignment, *pro tanto*. Where a party takes one of these instruments, there is nothing inequitable in refusing to give it the effect of either or both of the others. In vulgar parlance, he pays his money and takes his choice.

In the case of *Citizens' Bank, etc. v. First National Bank of New Orleans, supra*, where a bank in New Orleans had drawn certain drafts on a bank in Liverpool, with which it had an arrangement by which such drafts were to be paid out of funds remitted from time to time, representing to the parties purchasing them that they would surely be paid, because it had previously remitted sufficient funds to meet them, which was true, it was held that the drafts were no lien upon the fund, and that the assignee in bankruptcy of the drawer was entitled to it, as against the holder of the drafts. In delivering the opinion Lord Chancellor Selborne said: "My lords, it seems to me that the transaction is simply one of the most ordinary mercantile kind, and perfectly consistent with the ordinary course of dealing between the Liverpool bank and the drawers of the bills, which, upon the correspondence and the evidence, plainly was not one of specific trust or appropriation of any particular funds. The transaction was really of this kind—a person asked to take a bill wants to know distinctly whether the person who has drawn it has made provision for its payment. The statement is, we have sent forward to Liverpool funds of a much larger amount, which are intended to be used in the payment of this and other bills. My lords, if that be a specific appropriation, or an equitable assignment, it follows that every ordinary transaction in commerce, where any enquiry whatever is made, would come into the same category."

And in *Kimball v. Donald*, 20 Mo. 577, after stating the that "anything that shows an intention on the one side to make present irrevocable transfer of the fund, and from which an assignment to receive it may be inferred on the other, will operate in equity as an assignment, if supported by a sufficient consideration," the court said: "We are reminded that a bill of exchange is

transfer of a debt due the drawer, and so it undoubtedly is, as between drawer and drawee, when the latter accepts; but what is proposed here is, to make a bill that the drawee refused to accept operate as a transfer of the fund, without any reference to the intentions of the drawer, under the circumstances that have occurred. The object of drawing a bill is to convert a debt, in theory supposed to be due from the drawee to the drawer, into a transferable chattel that may pass from one to another by endorsement or delivery, and this object is consummated by the acceptance, which binds the acceptor to whoever becomes the holder, to pay as the original debtor, absolutely and without any reference to the state of the account between himself and the drawer, leaving the latter still liable, under his original conditional obligation to pay in default of payment of the primary debtor. These are the engagements created between the parties (drawer and drawee) and when acceptance is refused, the object the parties had in view being defeated, the only obligation upon the bill is against the drawer who is remitted to his original rights in respect to the fund in the hands of his supposed debtor, and liable to pay according to his original undertaking. No one supposes that it was the intention of the parties at the time this bill was drawn, that if it could not take effect as a bill, on account of the refusal of the drawee to accept, that then it should operate as an equitable assignment of whatever funds the drawee might have in his hands belonging to the drawer. That event was already provided for by the drawer's undertaking to pay himself upon such refusal. What authority, then, have we, under the circumstances, to put into the transaction a stipulation which the parties never thought of, and would have rejected at once, had it been suggested to them, and then give effect to the transaction as an equitable assignment, in order to carry out this supposed intention?"

We have discussed this question at some length, not with the intention of supplying any supposed deficiencies in Mr. Daniel's treatment of it, but to show that his presentation of the subject is incomplete and unreliable to the extent that it does not show the actual state of the law as administered by the leading law courts. It is the duty of a text writer to show not only what the law ought to be, but what it is, and in the case of a conflict upon a question of so much importance, he ought to show what the ruling upon it is in the leading courts, at least.

As in this connection some of the matters of distinction be-

tween a bill of exchange and a check have been referred to, we desire to call attention to Mr. Daniel's definition of a check (vol. 2, p. 498, *et seq.*) To the usual definition he adds "purporting to be drawn upon a deposit of funds." And, again: "It is not the fact that the order is actually drawn on a deposit, but the fact that it purports to be so drawn which constitutes it a check; and it is more accurate to say that it is *upon its face* a draft upon a deposit." We do not think so. The only essential structural difference between a check and a bill of exchange is that the latter must be drawn payable at some time in the future, while a check is payable immediately on demand. It is certainly true that a check by legal intendment is drawn upon a deposit. So it must be drawn upon a bank or banker, but it is not necessary that it purport, upon its face, to be so drawn. In other words, the law presumes, that an order drawn upon a bank for the unconditioned payment of a certain sum of money to a person therein named, or order or bearer, without express limitation as to time of payment or the fund out of which payment is to be made, was intended as a present appropriation of a deposit of at least that amount.

At the close of a well written chapter on Irregular Instruments, in which the rights of a *bona fide* holder of a negotiable instrument executed in blank are carefully considered, it is said that "a bond—that is a deed—for the payment of money stands upon an entirely different footing, in that it cannot be left blank either as to the sum, name of the obligee, or other material part, and filled up afterwards by an agent so as to bind the obligor." There are doubtless many well considered cases that support such a rule, but we think the weight and tendency of modern decisions is clearly otherwise. A blank instrument, whether negotiable or not, placed in the hands of an agent with the understanding that he is to fill the blank in a certain manner, or at his discretion, is full warrant for his so doing, and if the agent exceeds his authority, his principal, rather than an innocent third party, ought to suffer, on the principle laid down by Lord Holt in *Hern v. Nichols*, 1 S. Keld, 289, where he said: "Seeing somebody must be a loser this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a strange

Notable among the modern authorities on this point, not cited see *Butler v. United States*, 21 Wall. 272.

The chapter on the Rights of a *Bona Fide* Holder is written with evident care and with much discrimination, and shows t

the writer is capable of handling a subject logically and comprehensively, when he will. The following summary states the law on that subject as now recognized by most of the authoritative English and American courts:

“*First.* That the purchaser or holder of a negotiable instrument, who has taken it (1) *bona fide*, (2) for a valuable consideration, (3) in the ordinary course of business, (4) when it was not overdue, (5) without notice of its dishonor, and (6) without notice of facts which impeach its validity as between antecedent parties, has a title unaffected by those facts, and may recover on the instrument, although it may be without any legal validity as between the antecedent parties, as, for example, even though it was originally obtained by fraud, theft, or robbery.

Second. That the possession of a negotiable instrument payable to bearer, endorsed in blank, or specially endorsed to the holder, carries title with it to the holder. The possession and title are one and inseparable.

Third. That the burden of proof lies on the person who assails the right claimed by the party in possession.

Fourth. That suspicion of defect of title or knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title.”

“But,” he says, “these propositions are subject to the following limitations or qualifications: *First*, That when it is shown by the defendant that the instrument originated in fraud or illegality, the burden of proof will be shifted to the holder, and he must then show that he is a *bona fide* holder for value. *Second*. When it is shown that the instrument was given for a consideration which by statute is declared void, the original taint follows it, and it is void in the hands of every holder, however innocent. And *Third*, That no party can enforce a negotiable instrument if it be not genuine, or if it be executed by a party incapable of entering into the contract in which it was given.”

The principles recognized in the foregoing summary are not what may be classed as “new law.” They are as old as they are just, sound and convenient. In latter years, owing to influences that are well understood, many courts, to a greater or less extent, have ignored these ancient landmarks of the law of commercial paper; but we are now, it seems, enjoying the fruits of a sort of legal renaissance on this subject.

It may be noted that the third of the above exceptions, "That no party can enforce a negotiable instrument if it be not genuine," is as much too broad as it is too indefinite, and that is saying considerable.

The subject of the rights of a holder of a negotiable instrument secured by mortgage is one of considerable difficulty as well as importance, and has attracted no little attention in the last few years. We expected to find it discussed with some care and discrimination, but were disappointed. The subject is dismissed with a casual reference to the fact that some courts hold that the endorsee of the security takes the mortgage subject to only those equities that can be enforced against the negotiable instrument which it was given to secure, and that some other courts, (only three, as far as his notes show,) hold a contrary doctrine. This whole question needs thorough overhauling, and when Mr. Daniel set out to publish work on negotiable instruments, he placed himself under an obligation to do it. If he did not have time to discuss the authorities, he ought at least to have cited them. The best statement of the unsolved problems in this controversy, that we are familiar with, is in an article entitled the Negotiable Character of Mortgages, Cent. Law Journal, 501.

It may be noted, by the way, that the Supreme Court of Missouri in the case of Logan v. Smith, decided at the May term 1876, has wheeled into line in favor of the doctrine of the Supreme Court of the United States, as stated in Carpenter v. Longan, 16 Wall. 27 that the *bona fide* holder of a negotiable note for value before maturity will take the mortgage discharged of all equities which could not be set up against the note; overruling, or rather ignoring Potter v. McDowell, 43 Mo. 93.

Under the head of Conflict of Laws it is correctly stated that questions of evidence appertain to the remedy and are consequently controlled by the *lex fori*, and cases are cited supporting this doctrine, but no reference is made to the conflicting or qualifying decision of the Supreme Court of the United States in Scudder v. Union National Bank, 2 Cent. L. J. 827; 8 Chicago Legal News 105, where it was held that a parol promise, made in Illinois to accept a bill drawn there on parties in Missouri, and valid by the laws of Illinois, but not enforceable by the laws of Missouri, because not in writing, would be enforced in an action against the drawer in Missouri, on the ground that the parol promise to accept made in Illinois was an executed contract of acceptance, and if formal

solemnized there, it was valid in that respect everywhere. It does not necessarily follow that because a contract is valid where made, it can be enforced everywhere. It is not enough that there be a valid contract, but it must be so solemnized as to be capable of being established by legal and competent evidence, and what is legal and competent evidence must be determined by the *lex fori*. And Mr. Daniel states the rule too broadly when he says (§ 867) that "the law of the place where the contract is made regulates the formalities of its execution and authentication." The same language is used, however, by many very high authorities. But, nevertheless, it must be taken with some very important qualifications. Indeed, the exceptions are more important than the rule. Want of a critical examination of the authorities cited in support of the position leads to the erroneous statement (§ 891) that in the absence of proof to the contrary it will be presumed that the laws of a foreign country are the same as that of the forum. The rule is that as regards matters governed by the law merchant, that law will be presumed to be the same everywhere, in the absence of proof to the contrary, but when a local law of the forum abrogates or modifies that law there is no presumption that such modification has been adopted in a foreign jurisdiction. Loose expressions of courts applicable to the facts of a particular case should be accepted, as declarations of general principles, with much caution.

Book IV., treating of protest and notice, and excuses for want of presentment, protest and notice, is a very clear and exhaustive exposition of the subject and that, taken with the succeeding book on actions on Negotiable Instruments, and defences, discharges and damages, is well worth the price of the two volumes. The latter book is written with care and discrimination, in striking contrast with the slipshod generalities of some other portions of the work. But even here, where the author is at his best, there is noticeable absence of many important authorities. A too close adherence to the digest style leads to the statement (§ 1353) that, "if it be shown against an acceptor who proves his signature a forgery, that he has customarily paid similar drafts of the party forging, knowing the forgery, he will be held liable upon the bill, as having adopted such acceptances." Such is clearly not the law. The rule is that the ratification of any number of forged acceptances will not validate one not otherwise ratified, except in the hands of one who took it relying upon its validity on the ground of such former ratification, and who has lost some right by reason of such

reliance, and then, strictly speaking, the acceptance is not ratified, but the party whose name has been forged is estopped by his act from setting up the forgery. This view of the law is recognized in the closing sentence of the same section, and *Morris v. Bethell*, L. R. 5 C. P. 47, is cited, but the numerous American authorities recognizing this rule are given the cold shoulder. If the author had stated the rule in his own language, instead of attempting to patch it up from fragments of different decisions he would probably have stated it correctly on the first trial.

The alterations which will avoid a bill or note are discussed under the following heads: Changing (1) its date, (2) the time or (3) place of payment, (4) the amount of principal, (5) interest to be paid, (6) the medium or currency in which payment is to be made, (7) the number or relations of the parties, (8) the character and effect of the instrument as a matter of obligation or evidence. And it is laid down as a rule in the commencement that "it will be no answer to a plea of alteration that its operation is favorable to the parties affected by it whether in lessening the amount to be paid, enlarging the time of payment, or otherwise. No man has a right to vary another's obligations at his discretion, whether for his good or ill."

In respect to the alteration of the date of a bill or note, it is correctly stated that any change in the date imparts a new legal effect and operation to it, and is a material alteration, which avoids it as against prior parties and sureties even in the hand of a *bona fide* holder without notice." This rule seems to have been lost sight of by the Supreme Court of Louisiana in the recent case of *Helvase v. Hibernia National Bank*, 8 Chicago Legal News, 286. The defendant, on the 2nd day of July, 1874, certified a check for forty-one dollars, there was a blank left between the words "forty-one" and "dollars," in which the drawer inserted the words "hundred and fifty," and the date was changed from 2nd to the 7th of July; in this condition it came in the due course of business to the plaintiff who was a *bona fide* holder for value. It was held that he ought to recover. It is clear that the filling of the blank under the circumstances did not discharge the check as against the plaintiff, but that the alteration of the date did.

In Book VI., which treats of Negotiable Instruments other than bills and notes, many important questions, not discussed in previous treatises on bills and notes, to any considerable extent, and which may be classed "modern commercial law," are treated at

considerable length, but by no means exhaustively. The law of coupon bonds is unfortunately too well understood in the West and East. In the West every tax-payer is an expert on the question, and in the East the supposed strong-hold of the monopolous bondholder, the law has been mastered through much disappointment, loss and general tribulation. It has been a losing study to both sides, but the actual permanent advantage is largely on the side of the plowholder. The bondholders have on their hands a lot of worthless railroads which they are obliged to operate at a loss, for the benefit of the plowholders. We are lead to make these remarks by the fact that a perusal of Mr. Daniel's article on coupon bonds might mislead one, unacquainted with the facts, to suppose that the best of the fight was on the side of the bondholder. They have been shamefully robbed and would have been completely plucked but for the firmness of the Supreme Court of the United States. It was well for the cause of common honesty and justice that there was at least one court in the land that was not susceptible to the debasing influences of popular clamor. It cannot be denied, that in the course of this long and bitter struggle the law of Negotiable Instruments has been extended much beyond its old-time limits. But in the language of Mr. Justice Swayne, in *Merchant's National Bank v. State National Bank*, 10 Wall. 604. "The law merchant was not made. It grew. Time and experience, if slower, are wiser law-makers than legislative bodies." And if under the hands of this court the law has grown somewhat, it must be admitted that the growth has been a healthy one, and eminently promotive of justice and right dealing, as well as the public convenience.

As the result of a careful examination of Mr. Daniel's work, we find in it many of the elements of a good law-book. The conception is excellent, but the execution in many particulars is faulty and imperfect. The author brings to his work a clear, logical style and considerable familiarity with his subject. But he has published too soon. Every topic touched upon deserves to be treated with patient, conscientious care. None can safely be neglected to the advantage of others. A book on this subject, to live, must be uniformly good and reliable. A book of permanent worth must grow under the hand of the author, it cannot be dashed off mechanically at the order of the publisher. Every idea ought to be nursed and watched and handled with paternal solicitude. We do not hesitate to declare our opinion that Mr. Daniel can make this work,

as it is now in some respects, the most valuable treatise on the subject in the language. But we think he has done himself and the profession injustice by publishing with too much haste.

M. A. L.

A TREATISE ON THE AMERICAN LAW OF REAL PROPERTY. By EMORY WASHBURN, LL.D., Professor of Law in Harvard University, Author of "Easements and Servitudes." 3 vols. Fourth Edition. Boston: Little, Brown, and Company. 1876.

We have the present work in the shape—in the perfected form—in which it is probable the learned and eminent author will desire to leave it to the Profession which is so much his debtor.

The three superb volumes before us are the crowning work of a long life of study and unwearied industry: a monument which will long perpetuate the name of the venerable author, and of which the foremost man in his profession might justly be proud. It is rumored that the author received from the publisher for this edition the sum of \$14,000 in hand. We hope this is so, for it will be gratifying evidence of the deserved good fortune of the one, and of the well known liberality of the other. And yet even this sum, large as it seems as a reward of authorship, (always small in comparison with the gains from the practice of the law,) will scarcely repay the author for the labor which the work must have cost him.

It was a vast undertaking that he proposed to himself. The English Law of Real Property, complex, arbitrary, in a transition state, is the basis of the American law, but only the basis. The American law, while resting upon the English law, is expressed in the diverse legislation of forty states.

Lord St. Leonards has very justly observed, "that it is seldom possible to understand a law which repeals a former, and substitutes new provisions, unless we have a competent knowledge of the law repealed." So here. The American law on the subject could not be understood without a knowledge of the English; and to give this so far, and only so far, as necessary, and to trace its connection with, and relation to, the law as developed in this country, required both uncommon learning and uncommon industry.

This, fortunately, was found in Professor Washburn; and in this country his work has almost superseded every other, and stands quite without a rival. This edition, like the others, was prepared by the personal labor and attention of the author, and embodies

all the changes (neither few nor unimportant) which have been made in the different states within the past few years.

Among the new topics in present edition we notice those of homestead exemption; division fences; deeds signed in blank and afterwards filled; order of redemption of mortgage premises, and many others.

J. F. D.

THE SOUTHERN LAW REVIEW.

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PART I. OF THE POWER OF MUNICIPALITIES TO ISSUE NEGOTIABLE SECURITIES.

SECTION I. *Extent of Municipal Indebtedness—Comparative Statement here and in Great Britain and Paris, note.*—It is esti-

mated that the municipal indebtedness in this country has already reached the enormous sum of \$900,000,000, and it is constantly increasing.¹ A large portion of this indebtedness

¹ 'The Public,' July 27, 1876, page 53, where a list of the debts of sixty-two cities are given, amounting to \$618,205,488. The writer concludes his article with these admonitory observations: It "is high time to know how large a burden of indebtedness has been fastened upon the commerce and industry of the country through municipal government. Perhaps a full knowledge of the magnitude of that burden may awaken the tax-payers to prevent its increase, either by constitutional changes, or by reforms in the methods of local government. According to the latest report of the local government board in Great Britain, the indebtedness created for all purposes not national amounts to £92,000,000, or about \$460,000,000, having increased about \$100,000,000 within three years. In this country, the increase has been over \$360,000,000 in six years, or \$60,000,000 yearly, in only sixty-two cities and the other municipalities of two states. In the whole country, it has probably been nearly \$100,000,000 each year. Our local indebtedness includes \$382,000,000 for states, \$180,000,000 for counties, and probably \$900,000,000 for municipalities; in all \$1,462,000,000. It is a mortgage of about five per cent. upon the entire estimated wealth of the country. The interest exceeds six per cent. yearly. The annual tax upon industry and commerce exceeds \$90,000,000 for interest on local debt alone."

It thus appears that although our taxable property and resources are much less than those of Great Britain, our local debt is at least twice as large.

Recently the city of Paris, having proposed a new loan, the *Economiste Francaise* reviewed the growth of the debt of that city, and it appears that municipal extravagance is not confined to this side of the Atlantic. "The figures show," says the *London Economist*, alluding to the subject, "how the desire, partly to beautify the great city, and partly to give employment to its turbulent population, has led successive *regimes* to add extravagance to extravagance. In the first year of the rule of Napoleon as first consul, the expenditure of Paris was no more than 11,216,000 francs, or \$2,223,200; in the last year of the first empire, the sum had grown to 33,483,000 francs, or \$6,696,600. In fifteen years, that is, the expenditure of the city had trebled. The two invasions of 1814 and 1815 imposed heavy fines and an immense outlay upon Paris, which raised the expenditure for 1815 to the enormous sum of over 78,000,000 francs, or \$15,600,000.

"But in the first year of the Restoration, the outlay was again reduced to 36,000,000 francs (\$7,200,000), or not very much more than the sum spent in 1814. The elder Bourbons and their advisers had a lively recollection of the influence exerted on the Revolution by the disorder into

is evidenced by *negotiable bonds*, which are held by thousands of persons, at home and abroad, as an investment. These bonds have been issued for a great variety of purposes, such as the erecting of public buildings, the making of municipal improvements, and in payment of subscriptions for the stock of railway corporations, or as donations to aid them in the construction of their roads located in or near the municipality or public corporation thus extending its assistance.

SEC. 2. *Effect of power to issue municipal commercial securities for public improvements—Stimulus to extravagance—Abuse of power—Repudiation.*—The power conferred upon municipal and public corporations to issue *commercial securities* for such purposes is of comparatively recent origin, and it has, undeniably, been attended with very serious, and it is perhaps not

which the finances had fallen under Louis XVI, and therefore they practised economy in the administration. Accordingly, we find that in the last complete year of Charles X, 1829, the expenditures had risen only to 48,000,000 francs (\$9,000,000). Instead of trebling, as under the First Napoleon, in a nearly equal period of time under the Restoration the increase was only one-third. But with the government of Louis Philippe, we find a somewhat augmented outlay. In 1847 the expenditure had risen to 64,000,000 francs (\$12,800,000), it having been no more than 40,000,000 francs (\$8,000,000) in 1830.

"It was, however, under the second empire that extravagance gained free scope. We all remember the great works carried out by Baron Haussmann, the disregard of all financial rule, and the mystifications practised in the accounts. Even before the rise of Baron Haussmann, however, the expenditure swelled inordinately. In 1852, including the special as well as the general funds, it had grown to 102,000,000 francs (\$20,400,000), or 38,000,000 francs (\$7,600,000) more than in 1847. And in 1869 it had actually reached 346,000,000 francs, or \$69,200,000. Thus, as under the First Napoleon, the expenditure had more than trebled in a single reign. Furthermore, we see that, during the twenty years from the accession of the first consul to the breaking out of the war with Germany, the expenditures of Paris had been multiplied about thirty-one times, from less than £450,000 to nearly £14,000,000 sterling (\$70,000,000). Since the restoration of order, the attention of the government has been given to the enforcement of economy. But the minor debts upon the city have allowed of only a small measure of success being attained. In the present year, the expenditure is estimated at 305,000,000 francs, or \$61,000,000."

As to coupon bonds, see Daniel on Neg. Instr. sec. 1486, *et seq.*

too strong a statement to add, disastrous, consequences, the end of which is not yet. One of these is the stimulus which the long credit commonly provided for effectually supplies, to over-indebtedness. The bonds usually fix a time, twenty or thirty years distant, for payment of the principal. Those who vote the debt, and the councils or bodies which create it and issue the bonds, do so without much hesitation, as the burden is expected to fall principally on *posterity*. A learned justice of the Supreme Court of the United States has very fitly described the effect witnessed as a *mania* for running in debt for public improvements.² It has elsewhere been characterized as an "epidemic insanity" inducing extravagant corporate subscriptions to public works.

In many parts of the country, and particularly in the west, this mania has become general in cities, counties, townships and school districts, and large and burdensome debts have been thoughtlessly created. The writer has known new counties in a western state, not containing over 10,000 inhabitants, vote, for a single railway, bonds to the amount of \$300,000, drawing ten per cent. interest, payable annually, and instances are not infrequent where bonds have been issued greater than the assessed value of all the taxable property at the time, within the municipal or territorial sub-division. No check against the incurring of over-indebtedness is so effectual as the one *that you must pay as you go*, but this is wholly disregarded in the legislation which authorizes bonds payable at a remote period. Another serious consequence of this policy is, that even the *interest* on these bonds often proves to be a heavy burden upon the community, and in many instances the bonds have been issued fraudulently by the public or municipal officers, and no consideration, or none of value, has been, in fact, received therefor. They may, indeed, have the stock of the railway company, but in most cases, under the prevailing mode of constructing railways, the stock is utterly valueless. When the sting of taxation is felt, and when the tax-payer knows that the bonds were fraudulently issued, and even when

² Mr. Justice Davis.

he feels that they were improvidently given, experience shows that repudiation, or attempted repudiation, is the next stage, involving a forfeiture of the public faith pledged for their payment. Occasionally it has been witnessed that the *state*, in all its departments, has actively sympathized with the repudiating municipality, and the public faith has been redeemed only through the coercion of the Supreme Court of the United States. In a few instances, indeed, the *states* have set the example of repudiating their own obligations issued in aid of railways; and it was only last winter, in a case of this kind, that the Supreme Court at Washington felt itself bound to declare "that the faith of the state, [of Minnesota] solemnly pledged, has not been kept; and were she amenable to the tribunals of the country, as private individuals are, no court of justice would withhold its judgment against her."

Examples of this kind are demoralizing, and cannot safely become general or frequent.

SEC. 3. *Scope and nature of this paper*—*The law of Municipal Bonds as developed in the Federal Courts.*—The policy of burdening the future has been sanctioned by the legislature, and the courts have to deal with the legal rights of the municipality on the one hand, and the holders of its obligations on the other. The determination of their legal rights involves enquiries as complicated as they are important. The law on this subject is substantially the growth of the last twenty-five years. The decisions in the various State and Federal courts are very numerous, and on some points conflicting. The writer has treated the subject elsewhere,³ and does not in the present article intend to reproduce what is there said, or refer to it, except where it will serve to illustrate or abridge the present discussion. It is impossible, were it even desirable, to compass within the limits of a single article all the learning, and to refer to all the cases, upon the subject of municipal securities. It will not be attempted. By reason of the greater favor with which the rights of the holders of such securities have been regarded by the Supreme

³ Municipal Corporations, chaps. 14, 20.

Court of the United States, the volume of municipal bond litigation has of late years taken place in the Federal courts.

The present article will be devoted mainly to a consideration of the law on this subject as determined by the Supreme Court of the United States; and our object will be to show exactly the doctrines and principles which have received the sanction of that tribunal, and to illustrate, as far as needful, their application in particular instances, giving prominence to several important decisions made at the last term, not yet officially reported, and referring incidentally or for further illustration to the decisions of the State courts on the subjects or topics discussed.

The Supreme Court of the United States has upheld the rights of the holders of municipal securities with a strong hand, and has set a face of flint against repudiation, even when made on legal grounds deemed solid by the State courts, by municipalities which had been deceived and defrauded. That such securities have any general value left is largely due to the course of adjudication in respect thereto by the Supreme Court, and the reliance which is felt by the public that it will stand firmly by the doctrines it has so frequently asserted.⁴

SEC. 4. *Taxation limited to PUBLIC purposes—What are such—Aid to railways—Bonds to be paid by taxation for what purposes authorized.*—After the numerous decisions by courts of the highest authority, it may now be regarded as a settled doctrine of American law that no tax can be authorized by the legislature for any purpose which is essentially *private*: or, to state the proposition in other words, for any but a *public purpose*.⁵ What is a public purpose may not always be

⁴ As to the general tone, spirit and effect of the decisions of the Supreme Court concerning municipal securities, see Dillon, *Munic. Corp.* (2d Ed.) sec. 415, *et seq.*

⁵ *Loan Asso. v. Topeka*, 20 Wall. 655; *Curtis v. Whipple*, 24 Wis. 350; *Whiting v. Fon du Lac*, 25 Wis. 167; *Allen v. Inhab. of Jay*, 60 Maine, 124; *Jenking v. Andover*, 103 Mass. 94; *Lowell v. Boston*, 111 Mass. 454; *Pray v. Northern Liberties*, 31 Penn. St. 69; *Matter of Mayor of New York*, 11 Johnson, 77; *Camden v. Allen*, 2 Dutcher, 398; *Sharpless v. Mayor of Phila.*, 21 Penn. St. 147; *Hanson v. Vernon*,

easy to determine; but when determined, it constitutes the boundary of the power of taxation. Whether taxation to aid in the building of railways owned by private corporations is taxation for a *public* purpose, is a question which has been discussed and decided by the courts of last resort in almost every state in the Union, and by the Supreme Court of the United States.⁶ Although the doctrine of the constitutionality of such taxation has been vigorously resisted and combated, still it must be admitted that the great preponderance of the judicial judgments has been on the side of the competency of such legislation, in the absence of special constitutional restraint.⁷ And therefore the legislature may authorize subscriptions by municipalities to the stock of railway corporations, or donations to them, and provide for the payment of such subscriptions or donations by the issue and sale of the negotiable bonds of the municipality. But a statute which authorizes the issue of bonds to be paid by taxation to aid certain individuals or classes, or in aid of the *manufacturing enterprise* of individuals or private corporations, is void—this being within the meaning of the rule, a *private*, as distinguished from a *public* purpose, although in a remote or col-

27 Iowa, 47; Cooley, Const. Limit., 129, 175, 48; Dillon, Munic. Corp., sec. 587, and cases cited; Cooley on Taxation, chap. IV, "where the purposes for which taxes may be laid" are enumerated, and illustrated by the adjudicated cases.

⁶The cases are collected, Dillon's Munic. Corp. (2d Ed.), secs. 104, 105; Rogers v. Burlington, 3 Wall. 654; Supervisors v. Schenck, 5 Wall, 772, 779; Olcott v. Supervisors, 16 Wall. 678; Railroad Co. v. Otoe Co., 16 Wall. 667; Loan Asso. v. Topeka, *supra*; Township of Pine Grove v. Talcott, 19 Wall. 666. 1873.

⁷In Pine Grove Township v. Talcott, 19 Wall. 666, 677, Mr. Justice Swayne says that such legislation has been sustained in nineteen out of twenty-one states. As respects legislative power, *donations* and subscriptions for stock stand on the same ground. Town of Queensbury v. Culver, 19 Wall. 83. 1873.

If it be allowable to judge of a legal principle by its fruits, the dissenting and minority judges on this question will find much to confirm the conviction that their views were sound. But it is useless to fight that battle over again; it has been fought and lost. All that is left is the contemplation and contrast of what might have been and what is.

lateral way the local public might be benefited thereby.⁸

The execution of the powers ordinarily conferred upon municipal corporations, such as improving highways and streets, constructing water works, gas works, markets, preserving the public health, and the like, are of course public purposes,⁹ and upon legislative authority being given, negotiable bonds may be issued therefor. What will constitute sufficient authority for the issue of such bonds will be considered further on.

SEC. 5. *Two great classes of Municipal Securities: 1. Ordinary warrants; 2. Negotiable bonds—Form, execution, and attributes of each.*—It is material to bear in mind the *different kinds* of corporate evidences of debt. These are of two general classes. FIRST, *there is the usual municipal or county warrant or order.* These are commonly drawn by one or more of the officers upon the treasurer, directing him to pay to the person named or *bearer* a given sum of money. The power to issue them, and the mode in which it is to be exercised, are usually prescribed by charter or statute. They are vouchers or “necessary instruments for carrying on the machinery of municipal administration and for anticipating the collection of taxes,”¹⁰ out of which they must be paid.

It is, perhaps, true that the power to issue such warrants or orders may, where not expressly conferred or denied, be *implied* as incidental to carrying out the objects of a munici-

⁸ *Loan Asso. v. Topeka, supra.* And they are incapable of municipal or legislative ratification. *Ib* *Commercial Bank v. Iola*, 2 Cent. Law J. 167. Same cases below. 2 Dillon's C. C. R. 353; 3 Dillon's C. C. R. 376. Same principle. *Lowell v. Boston*, (aid to enable citizens to rebuild houses destroyed by a large fire,) 111 Mass. 454, 1873; *Allen v. Jay*, (aid to construct mills,) 60 Maine, 124, 1871. The cases cited in this note were approved in *The State etc. v. Osawkee Township*, 14 Kansas, 418, 1875, in which the Supreme Court of Kansas held an act whose object was to provide the destitute with provisions and with grain for seed and feed, and to issue bonds for that purpose, unconstitutional, because not issued for a *public* purpose.

⁹ Cooley on Taxation, chap. 4, p. 67, *et seq.*; Daniel on Nego. Instr., § 1522, and cases cited; Dillon, Mun. Corp. *passim*.

¹⁰ *Per* Bradley, J., in *The Mayor of Nashville v. Ray*, 19 Wall. 468, 477. 1873.

pal or public corporation. Such instruments issued by municipal and public corporations, by usage, are generally treated as negotiable in the sense of being transferrable by delivery, and in most of the states the transferee or holder may enforce payment by suit or by *mandamus* in his own name.¹¹ But it is a mistaken notion, and one which has no support in reason or policy, and but little in the adjudications, that they are either commercial paper or possess the attributes of such paper.

On the contrary, in whosoever hands they may be, or at whatever time purchased, whether with or without notice, they are always open to any defence which might have been made against the payee or original holder.¹² The fundamental idea is that they are *not* commercial securities, and are not governed by the rules of the law merchant in respect of negotiable instruments.

SECOND, *there is the municipal bond, negotiable in form*, payable at a future day, intended for sale in the market, issued under *express* authority of the legislature. These, notwithstanding they are under seal, are clothed with all the attributes of negotiable or commercial paper, pass by delivery or endorsement, and are not subject to equities, (where the power to issue them exists,) in the hands of holders for value, before due, without notice. This has ceased to be a disputed point, and the cases adjudging or recognizing this principle in the state courts are very numerous.¹³ Such bonds usually have

¹¹ The cases on the point are cited in Dillon on Munic. Corp. § 406, note. *Infra*, § 28.

¹² The Mayor etc. v. Ray, 19 Wall. 468, 477, 478; Dillon, Munic. Corp. sec. 406, where the cases are collected.

¹³ Mercer Co. v. Hackett, 1 Wall. 83, 1863, and other cases cited in Dillon on Munic. Corp., § 405, note; Daniel on Nego. Instr., § 1500, and cases there cited.

Form of Bond—Condition.—Municipal bonds, in the usual form, containing words of negotiability, with coupons attached, are absolute, and not conditional, promises to pay, and hence are negotiable with all the incidents of negotiability, notwithstanding they contain the following recital: "This bond is issued for the purpose of subscribing to the capital stock of the Fort Scott and Allen County Railroad, and for the construction of the same through the said township, in pursuance of and in

coupons attached, which partake of the nature of the bond, are likewise negotiable, may be detached and held separately from the bond, and the holder may sue thereon in his own name, without producing or being interested in the bonds to which they were originally attached.¹⁴

accordance with an act of the legislature of the state of Kansas, entitled 'An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same, approved February 25, 1870;' and for the payment of the said sum of money and accruing interest thereon, in manner aforesaid, *upon the performance of the said condition*, the faith of the aforesaid Humboldt township, as also its property, revenue and resources, is pledged," the court holding that the construction of the road through the township was not a condition upon which payment was to be made. *Humboldt Township v. Long*, U. S. Sup. Court, Oct. Term, 1875, 3 Cent. Law Jour. 494.

In giving its judgment, the court says: "Relying upon this clause of the certificate the township contends that the construction of the railroad through the township was a condition upon which the payment was agreed to be made. We think, however, this is not the true construction of the contract. The construction of the road as well as the subscription for stock were mentioned in the recital as the reasons why the township entered into the contract, not as conditions upon which its performance was made to depend. It was for the purpose of subscribing, and to aid in the construction of the road, that the bond was given. The words, 'upon the performance of the said condition,' cannot, then, refer to anything mentioned in the recital, for there is no condition there. A much more reasonable construction is that they refer to a former part of the bond, where the annual interest is stipulated to be payable at a banker's, 'on the presentation and surrender of the respective interest coupons.' Such presentation and surrender is the only condition mentioned in the instrument. But that stipulation presents no such contingency as destroys the negotiability of the instrument. It is what is always implied in every promissory note or bill of exchange, that it is to be presented and surrendered when paid. As well might it be said that a note payable on demand is payable upon a contingency, and therefore non-negotiable, as to affirm that one payable on its presentation and surrender is, for that reason, destitute of negotiability." See, also, *Hotchkiss v. National Bank*, 21 Wall. 354, 1874. *As to form of bonds, seal, place of payment and delivery*, see cases cited Daniel on Neg. Instr., §§ 1492-1499.

Power to *substitute* other bonds. *Lynde v. County*, 16 Wall, 6; *McKee v. Vernon Co.*, 3 Dillon C. C. R. 210.

¹⁴ *Thompson v. Lee Co.*, 3 Wall. 327; *Dillon on Munic. Corp.* § 405, note; *Kennard v. Cass Co.*, 3 Dillon C. C. R. 147, 1874; *Daniel on Neg.*

SEC. 6. *As to the implied power to borrow money and issue commercial or negotiable paper.*—Much conflict of opinion has existed in the American courts touching the *implied power* of public and municipal corporation *to issue commercial or negotiable instruments*, that is, instruments free from equities in the hands of innocent holders for value. In respect of *public* or *quasi* corporations, such as counties, etc., as distinguished from *municipal* corporations proper, the general current of authority is against the proposition that, as ordinarily organized, they possess any such implied power. And the power is not incident to the authority to make specified expenditures or improvements, but it may be implied, where there is nothing to rebut it, from other powers, such as the express power to borrow money.¹⁵

But in view of the more complex and diversified powers Instr., § 1509, and cases cited. The proposition of the text is not a disputed one, and coupons, when disconnected from the bonds, have an independent existence. *Clark v. Iowa City*, 20 Wall. 586; *Daniel on Neg. Instr.*, § 1510.

Coupons—Form of Instrument.—Maker suable thereon in assumpsit, where the bonds are made by the defendant corporation and refer to the coupon, though the latter, signed by the agents of the corporation, is in the form of an order or check on a bank named therein. *Town of Queensbury v. Culver*, 19 Wall. 83, 1873. Cases as to the form of coupons, see *Daniel on Neg. Instr.*, §§ 1492–1496. May be made payable *beyond limits of the state*, unless specially restrained by statute. *Lynde v. County*, 16 Wall. 6.

How signed.—The coupons, where the bonds are properly signed and sealed, may be *signed by a printed fac simile* of the maker's autograph, adopted for the purpose, although there is no statute authorizing it. *Pennington v. Baehr*, (Sup. Court of Cal.,) 2 Cent. Law Jour. 92. See *McKee v. Vernon Co.*, 3 Dillon C. C. R. 210; *Lynde v. County*, 16 Wall. 6.

¹⁵ *Police Jury v. Britton*, 15 Wall. 566, 1872. The ordinary powers possessed by counties, as agencies of the state in the administration of public affairs, do not give the incidental power to issue negotiable bonds and coupons. "It would be an anomaly, justly to be deprecated, for all our limited territorial boards, charged with certain objects of necessary local administration, to become fountains of commercial issue, capable of floating about in the financial whirlpool of our large cities." *Id. per Bradley, J.* See *Lynde v. County*, 16 Wall. 6.

Distinction between *public* and *municipal* corporations, in the sense referred to in the text, see *Dillon on Munic. Corp.* secs. 10, 30, 33, 39.

usually conferred upon chartered or municipal corporations proper, there has been a stronger tendency on the part of the courts to hold that such corporations, as usually existing in this country, have an incidental or implied power to issue commercial securities. The line of argument is substantially this:—Trading and commercial corporations have this power as an incidental means of effecting their objects; why not municipal corporations as well? Municipal corporations are clothed with large powers, which necessarily oblige them to use credit or to create debts: therefore, if they may create debts, they may borrow the money to pay them, and if they may borrow money, they have the incidental power to do like other borrowers, namely, give a negotiable bill, note or bond therefor. The whole argument, in our judgment, is unsound. It is true, that in this country private business corporations are usually considered to have the incidental power to borrow money or give negotiable paper as an evidence of their indebtedness, but in England it is held that express power is necessary to enable even railway corporations to draw, endorse or accept bills of exchange.¹⁶ But admit that the American doctrine is otherwise,¹⁷ and that it is rightly so, still there is no resemblance between private and public or municipal corporations in this regard. The latter are simply agencies of government. They are not organized for trading, commercial or business purposes. They have, in general, but one mode of meeting their liabilities, and that is by taxation, and it is upon this resource that creditors must be taken to rely. For hundreds of years in England, such corporations have existed, without it ever being contended that they could, without express authority, issue commercial paper. Private corporations are much more vigilant and watchful of their interests than it is possible for public or municipal corporations to be. The frauds which unscrupulous officers will

¹⁶ See observations of Byles, J., in *Bateman v. Mid-Wales Railway Co.*, Law Rep. 1 C. P. 510, 1866.

¹⁷ *Stratton v. Allen*, 16 N. J. Eq. 229; *McCullough v. Moss*, 5 Denio, 567; *Straus v. Eagle Ins. Co.*, 5 Ohio St. 59; 2 Kent's Com. 229; 1 Parsons' Notes and Bills, 165.

be enabled successfully to practise, if an implied and unguarded power to issue negotiable securities is recognized, and which the corporation or the citizen will be helpless to prevent, is a strong argument against the judicial establishment of any such power. And the argument is unanswerable, when it is remembered that in ascertaining the extent of corporate powers, there is no rule of safety but the rule of *strict* construction, and that such an implied power is not necessary, however convenient it may be at times, to enable the corporation to exercise its ordinary and usual express powers, or to carry into effect the purposes for which the corporation is created. We regard as alike unsound and dangerous the doctrine that a public or municipal corporation possesses the *implied power* to borrow money for its ordinary purposes, and as *incidental* to that, the power to issue commercial securities. The cases on this subject are conflicting, but the tendency is towards the view above indicated. The opinion of Mr. Justice Bradley, in a case before referred to,¹⁸ evinces a thorough comprehension of the whole question, and, in our judgment, is sound in every proposition it advances, and must become the law of this country. This view is confirmed by the almost invariable legislative practice in the states to confer, when it is deemed expedient, upon municipalities and public corporations, in *express* terms, the power to borrow money or to issue negotiable bonds or securities, and it is of instruments thus authorized that the present article designs principally to treat. It is an admitted and undisputed doctrine that the power of public and municipal corporations to subscribe to the stock of railway companies and issue bonds therefor must be *expressly* conferred.¹⁹

¹⁸ The Mayor v. Ray, 19 Wall. 478, 1873. It is difficult to understand on what ground the dissenting judges in this case regarded the corporation *warrants* as "negotiable securities of a commercial character." The cases are almost uniform that such instruments do not partake of the nature of commercial paper, except that by usage and custom, and sometimes by legislative enactment, they pass by delivery. *Supra*, sec. 5, and authorities there referred to.

¹⁹ The cases on this point are collected in Dillon's Munic. Corp. sec. 106, note.

SEC. 7. *Want of power, always a defence—Question of power is the one of chief interest and importance.*—Touching the rights of the holder of authorized negotiable municipal securities, it may be observed here as introductory to what follows, that such instruments are *commercial paper*, and governed by the rules of the law merchant concerning such paper, and that as respects a holder for value, before due, without notice of facts constituting a defence thereto, the only defence which is available is, that there was *no power* in the defendant corporation to issue the bonds or instruments in question. This principle is thus expressed in one of the judgments of the Supreme Court: "Bonds, payable to bearer, issued by a municipal corporation, * * if issued in pursuance of a power conferred by the legislature, are valid commercial instruments; but if issued by such a corporation which possessed *no power* from the *legislature*, they are invalid, even in the hands of innocent holders."²⁰ *Irregularities* in the exercise of the power, as against a holder for value, without notice of such irregularities, constitute no defence. Since, therefore, *want of power* is the *only* defence open to the corporate maker of such instruments, when they have been negotiated (as almost invariably is the case for value to innocent holders), the question of *power* is the one around which the principal interest centers, and to which, in its various phases, we shall give our main attention. And concerning this subject, obviously, the essential enquiries are, *when* the power exists or arises; *who* is to decide whether it existed or had arisen when the bonds were issued; and what will *estop* the corporation to set up non-compliance with antecedent or preliminary conditions, and it is these enquiries that we shall examine and illustrate chiefly by reference to the decisions of the Supreme Court of the United States, noticing incidentally the decisions of the State courts.

²⁰ *Per* Clifford, J., in *St. Joseph Township v. Rogers*, 16 Wall. 644, 659, 1872. As nearly all the cases in the Supreme Court have turned on the question of power, it is not deemed material to cite them in this connection, as the propositions in the text are no longer the subject of judicial controversy.

SEC. 8. *Different classes of bonds—Implied and express power to issue—Recitals—Mode of pleading, see note.*—Negotiable securities of the kind here referred to have been issued by *municipal corporations proper* (generally under an *express* power to aid railways, or for gas works, water works or specified local improvements, but sometimes under an *implied* power), and *by counties*, usually under express power (generally to aid railways, or for public buildings, bridges or improvements²¹), and *by organized townships* which are parts of counties, under express authority, and usually as a means of aiding the construction of railways, and *by school districts*, under express power to raise money to erect school-houses. In some of the Western states, counties have been legislatively made the agents for the inhabitants of non-incorporated

²¹ In several of the states power is given to municipalities or counties to issue bonds to *aid* works of "*internal improvement*." And under this generic term, the question has arisen, what are works of internal improvement? The Supreme Court of Alabama, in defining the phrase "*internal improvements*," says: "Where internal improvements under state authority are spoken of, it is universally understood that works within the state by which the public are supposed to be benefitted are intended; such as the improvements of highways and channels of travel and commerce." *Mayor et al. of Watumpka v. Newton*, 23 Ala. 660.

The legislature of Nebraska passed an act "That any county or city in the state of Nebraska is hereby authorized to issue bonds to *aid* in the construction of any railroad or other work of *internal improvement*, to an amount to be determined by the county commissioners of such county, or the city council of such city, not exceeding ten per cent. of the assessed valuation of all taxable property in said county or city, *provided* the county commissioners or city council shall first submit the question of issuing bonds to a vote of the legal voters of said county or city, in the manner provided by chapter nine of the Revised Statutes of the state of Nebraska, for submitting to the people of a county the question of borrowing money." Session Laws of 1869, page 92.

Under this act, a county and a precinct issued bonds to build a bridge across the Platte river, and on an application by a taxpayer to restrain the collection of taxes levied to pay interest on such bonds, the Supreme Court of Nebraska, construing the above act in the light of the legislation of the state, held that a *bridge* was a work of "*internal improvement*" within the meaning of the statute, and that under the power to *aid* the county might itself construct the bridge. *Union Pacific R. R. Co. v. Colfax County*, 3 Cent. Law Jour. 287; S. C. 4 Nebraska, 450, 1876.

townships, and in Missouri for "strips of territory" to issue bonds in the name of the county, but to be paid out of the property within the specified township or designated territorial limits or strip of country.²² Reference is made to this subject here, in order to observe that where the bonds or securities are issued under an express power, the legislative act, being the source of the authority, measures and limits the power it confers, and the same principles apply to the instruments issued under it by *any* of these classes of corporations, or *quasi* corporations. But in respect to all these corporations and *quasi* corporations, except, possibly, municipal or chartered corporations proper, we suppose that there is no solid ground to contend that they have any inherent or general power to issue commercial securities, and can only do so by virtue of express legislative authority, which *must* exist in fact, and which ought regularly to be recited in the bond. And in respect to municipal or chartered corporations, our opinion, as indicated in a preceding section, is that they also have no such inherent power, and no power whatever except so far as conferred expressly or by fair implication. This is an important principle, and it results from it that there is no presumption in favor of the power to issue such securities, especially on the part of *quasi* corporations, and it would seem to follow from it that if the bonds of such corporations contain no recital as to the authority for their issue or their purpose, there would be no presumption in favor of their validity, and it would devolve on the holder to aver and show by evidence *aliunde* that the bonds were issued for some purpose authorized by statute. And hence also, *as a matter of pleading*, the authority or power to issue the bonds in suit ought to appear on the face of the declaration, or by some recital in the bonds made part thereof; that is,

²² Construction of the Missouri *township* railway aid act of March 23, 1868, and the rights and remedies of the bond-holder. *Jordan v. Cass Co.*, 3 Dillon, C. C. R. 185; *Same v. Same*, Id. 245; *Washburn v. Cass Co.*, Id. 251; *Harshman v. Bates County*, Id. 150; S. C., in supreme court, Oct. Term, 1875 3 Cent. Law Jour. 367, referred to at large *infra* sec. 19. Construction of *Kansas* legislation, *Thayer v. Montgomery Co.*, 3 Dillon, C. C. R. 389, and note.

it should thus appear that they were issued for some purpose authorized by statute.²³

²³ Thayer v. Montgomery Co., 3 Dillon, C. C. R. 389, and note; Kennard v. Cass County, Ib. 147; Nashville v. Ray, 19 Wall. 468.

Mode of declaring on bonds and coupons. Kennard v. Cass County, 3 Dillon, C. C. R. 147, and cases cited in note on p. 150; Thayer v. Montgomery County, *supra*.

Mode of pleading defences. The plea of the *general issue* in *assumpsit* in states where that mode of pleading is yet allowed, puts in issue the question of the authority of the officers to issue the bonds and the *bonds* of the plaintiff, but presumptively the plaintiff is a holder for *value* before maturity, without notice; the contrary must be shown by the *defendant*. Chambers County v. Clews, 21 Wall. 317, 1874; Pendleton County v. Amy, 13 Wall. 297. Special plea erroneously held bad, considered as amounting to the general issue, and as the erroneous ruling was harmless, the judgment was not reversed. Ib.

Answer denying that plaintiff is the *owner, holder or bearer of the coupons* in suit good on general demurrer. Pendleton County v. Amy, 13 Wall. 297.

Proof of execution of bond when denied under oath. Under the *legislation* of Alabama, *non assumpsit* does not involve the *factum of the bonds*. Chambers County v. Clews, 21 Wall. 317, 1874.

Corporation may plead *nil debet* and *non est factum*. Grand Chute v. Winegar, 15 Wall. 355, 1872.

Remedy at law. Corporation cannot be relieved against bond in equity if the ground for relief shows complete defence or an *adequate remedy at law*. Grand Chute v. Winegar (case in equity), 15 Wall. 373.

The *statute of limitations* commences to run on coupons *detached from the bonds* and negotiated separately, from the time the coupons mature, and the operation of the statute, in such a case, is not deferred until the maturity of the bonds to which the coupons belonged. This point has been expressly adjudged by the Supreme Court in Clark v. Iowa City, 20 Wall. 583, 1874, and the prior decisions which had been supposed to hold otherwise, explained to mean only that when the bonds were specialties, the coupons, though detached, partook of the same nature, and therefore the same statute of limitations applied to both the coupons and the bonds; that is, if the bonds were specialties, so were the coupons, and the statute of limitations as to sealed instruments, and not the more restricted statute applicable to simple contracts, applied. Kenosha v. Lamson, 9 Wall. 477; Lexington v. Butler, 14 Wall. 282. Whether the statute commences to run on *unsevered* coupons from the date of their maturity has not been decided by the Supreme Court. As to *limitation statutes*, see De Cordova v. Galveston, 4 Texas, 470, 1849; Underhill v. Trustees, 17 Cal. 172; Baker v. Johnson County, 33 Iowa, 151.

· **SEC. 9. Condition precedent to exercise of power—Popular vote—Non-compliance with condition precedent—Recital—Restraining issue of bonds.**—Generally, the power of the municipality, county or other local civil sub-division of the state, to subscribe for the stock of railway companies and issue bonds in payment, is conferred upon certain officers, not absolutely, but on the *condition* of a previous approving popular vote, or the assent of a majority or of some greater proportion of the resident tax-payers. If this sanction is given, then the officers, by the usual legislation, are authorized to make the subscription and to issue bonds in payment therefor. A very common defence to such bonds consists in a denial that the condition precedent, *i. e.*, the approving vote, the assent of the tax-payers, or whatever else it may be, has, in fact, been complied with, and hence, as contended, the power to issue the bonds did not exist, or never arose.

Where the legislation is of this character,—namely, requiring compliance with some such condition before issuing the bonds,—the Supreme Court of the United States does not hold, as we understand their decisions, that the power can be rightfully exercised unless the condition precedent has been performed. As between the immediate parties, the municipality and the railroad company, doubtless, the enquiry is open, and fully open, whether the condition on which the rightful exercise of the power depends has been complied with, and if it has not been, on due application, the issue of the bonds will be enjoined,²⁴ or if they are in the hands of the original party or of holders with notice, an action to enforce the bonds may, if no estoppel exists, be successfully defended.²⁵

In such a case, there is no legal ground for maintaining that the action of the local officers in issuing the bonds, or any

As to rights and title of purchaser of coupons *overdue*, *Arents v. Commonwealth*, 18 Gratt. (Va.) 750; *Daniel on Neg. Instr.*, secs. 1505, 1506.

²⁴ As to the duty of enjoining the issue of bonds on the pain of being estopped to set up irregularities in the exercise of the power, see *infra*, sec. 23.

²⁵ *Chambers County v. Clews*, 21 Wall. 317, 321, 1874.

recital they may make therein, will conclude the question whether the condition precedent has been performed. And there is no decision of the Supreme Court of the United States in conflict with this statement of the law, but several which support it.²⁶

SEC. 10. *Estoppel by recital to show non-compliance with conditions precedent—Knox County v. Aspinwall.*—When the bonds have been issued and sold in the market, and, before maturity, have come for value, and without notice, into the hands of innocent holders, another element of great importance may, according to the doctrine of the Supreme Court, be introduced into the transaction, as respects compliance with conditions precedent,—*the element of estoppel*. This is so important in its practical relations to the subject as to require careful and minute consideration. Conceding that the rightful exercise of the power to issue the bonds depends upon a condition precedent, for example, a popular vote in favor of the proposition, *when, how and by whom is it to be ascertained whether the condition precedent has been performed*.

Is it to be ascertained, once for all, before the bonds are issued? Or is it open to enquiry and contestation in every action upon a coupon or bond? Is the municipality estopped, in favor of a *bona fide* holder of the bonds, from setting up this defence? and in what cases will the estoppel be available in favor of the holder? These are grave questions, and cases involving them have been frequently before the Supreme Court—the first and leading case being *The Commissioners of Knox County v. Aspinwall*.²⁷ The case just cited has been fre-

²⁶ *Chambers County v. Clews, supra*. That court has several times adverted to the duty of the corporation or tax-payer to interfere by injunction to restrain the issue of bonds where the statute has not been complied with. *Injunction lies to restrain issue of bonds* where there has been a material departure from the statute. *Union Pacific R. R. Co. v. Lincoln County*, 3 Dillon, C. C. R. 300, 1873; *Same v. Merrick*, *Ib.* 359; *Railroad Co. v. Hartford*, 58 Maine, 23; Dillon, *Munic. Corp.* (2d Ed.), sec. 108, and cases cited. "In cases arising *before* the issue of the bonds, estoppel has no place, and the sound doctrine is, that compliance with all substantial or material conditions is essential." *Ib.*

²⁷ *Commissioners of Knox County v. Aspinwall*, 21 How. 539, 1858.

quently referred to and followed, and one of the two grounds on which it rests, if not, indeed, both of them, still has the approval of the court, as will be seen by one of its most recent judgments.²⁸

The case of *Knox County v. Aspinwall*, and the numerous cases in the Supreme Court which had followed it down to 1873, were considered by the writer of the present article to establish the following principle: "If upon a true construction of the legislative enactment conferring the authority (viz. to issue municipal bonds upon certain conditions), the corporation, or certain officers, or a given body or tribunal, are invested with power to decide whether the condition precedent has been complied with, then it may well be that their determination of a matter *in pais* which they are authorized to decide, will, in favor of the bondholder for value, bind the corporation."²⁹

"This," says Mr. Justice Strong, in one of the latest cases, after quoting the above language, "is a very cautious statement of the doctrine" of the Supreme Court. And he adds, "It may be re-stated in a slightly different form. Where legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and The reader will find a brief but careful statement of this case (which we omit here to save space) in *Dillon on Munic. Corp.* (second edition) sec. 417. The more important cases in which *Knox County v. Aspinwall* has been cited and followed are: *Moran v. Miami County*, 2 Black, 722, 724, 1862; *Supervisors v. Schenck*, 5 Wall. 772, 1866; *Rogers v. Burlington*, 3 Wall. 654; *Woods v. Lawrence County*, 1 Black, 386; *Mercer County v. Hackett*, 1 Wall. 83; *Meyer v. Muscatine*, 1 Wall. 385, 393; *Van Hostrup v. Madison City*, 1 Wall. 291; *Bissell v. Jeffersonville*, 24 How. 287; *Gelpcke v. Dubuque*, 1 Wall. 175, 203; *Pendleton County v. Amy*, 18 Wall. 297, 1871; *St. Joseph Township v. Rogers*, 16 Wall. 644, 1872; *Lexington v. Butler*, 14 Wall. 284; *Grand Chute v. Winegar*, 15 Wall. 572, 1872. The yet more recent cases are referred to *infra*.

²⁸ *The Town of Coloma v. Evans*, Oct. Term, 1875, 3 Cent. Law Jour. 325. The Case of *Coloma v. Evans*, as to the local officers being constituted a tribunal to determine whether the condition precedent had been complied with, was cited and approved in the subsequent case, at the same term, of *Venice v. Murdock*, 3 Cent. Law Jour, 322. See, also, *infra*, sec. 13.

²⁹ *Dillon on Munic. Corp.* (second edition) sec. 419.

to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality, for the recital is itself a decision of the fact by the appointed tribunal. In *Bissell v. Jeffersonville*, 24 How. 287, it appeared that the common council of the city were authorized by the legislature to subscribe for stock in a railroad company, and to issue bonds for the subscription, on the petition of three-fourths of the legal voters of the city. The council adopted a resolution to subscribe, reciting in the preamble that more than three-fourths of the legal voters had petitioned for it, and authorized the mayor and city clerk to sign and deliver bonds for the sum subscribed. The bonds recited that they were issued by authority of the common council, and that three-fourths of the legal voters had petitioned for the same, as required by the charter. In a suit subsequently brought by an innocent holder for value, to recover the amount of unpaid coupons for interest, it was held inadmissible for the defendants to show that three-fourths of the legal voters of the city had not signed the petition for the stock subscription. A similar ruling was made in *Van Hostrup v. Madison City*, 1 Wallace. 291, and in *Mercer County v. Hackett*, 1 Wallace, 83. The same principle has recently been asserted in this court, after very grave consideration, and it must be considered as settled. In *St. Joseph Township v. Rogers*, 16 Wall. 644, it is stated thus: 'Power to issue bonds to aid in the construction of a railroad is frequently conferred upon a municipality in a special manner, or subject to certain regulations, conditions or qualifications, but if it appears by their recitals that the bonds were issued in conformity with these regulations, and pursuant to those conditions and qualifications, proof that any or all these recitals were incorrect will not constitute a defence for the corporation in a suit on the

bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition or qualification, which it is alleged was not fulfilled.' There is nothing in the case of *Marsh v. Fulton County*, 10 Wall. 676, at all inconsistent with the rule thus asserted. In that case there were *no* recitals in the bonds, and there was no decision that the conditions precedent to a subscription, or to the gift of authority to subscribe, had been performed. The question was, therefore, open. What we have said disposes of the present case without the necessity of particular consideration of the matters urged in the argument of the defendant below. It was inadmissible to show what was attempted to be shown, and even if it had been admissible, the effort to assimilate the case to *Marsh v. Fulton County* would fail. There the subscription was for the stock of a different corporation from that for which the people had voted.'³⁰

³⁰ *Town of Coloma v. Evans, supra*. In this case, legislative authority was given to the town to make the subscription and issue the bonds on the previous sanction of a popular vote, to be ascertained, as the court construed the enactment, by the officers of the town, who were empowered to execute the bonds. The bonds were executed in due form by the proper officers, and duly registered with the auditor of state, and contained the *recital* that they "*are issued under and by virtue of the act incorporating the railroad company,*" approved March 24th, 1869, "*and in accordance with the vote of the electors of said township of Coloma, at a regular election held July 28, 1869, in accordance with said law.*"

The scope and effect of the doctrine of the court are illustrated by the following brief separate opinion in the case, given by Mr. Justice Bradley, who says :

"I dissent from the opinion of the court in this case, so far as it may be construed to reaffirm the first point asserted in the case of *Knox County v. Aspinwall*, to wit: that the mere execution of a bond by officers charged with the duty of ascertaining whether a condition precedent has been performed, is conclusive proof of its performance. If, when the law requires a vote of tax-payers, before bonds can be issued, the supervisor of a township, or the judge of probate of a county, or other officer or magistrate, is the officer designated to ascertain whether such vote has been given, and is also the proper officer to execute and who does execute the bonds; and if the bonds themselves contain a state-

SEC. 11. *Estoppel by recital—Failure to give notice of election, or notice for the required time.*—As showing the application and effect of the doctrine stated in the preceding sec-

ment or recital that such vote has been given, then the *bona fide* purchaser of the bonds need go back no further. He has a right to rely on the statement as a determination of the question. But a mere execution and issue of the bonds without such recital, is not, in my judgment, conclusive. It may be *prima facie* sufficient; but the contrary may be shown. This seems to me to be the true distinction to be taken on this subject, and I do not think that the contrary has ever been decided by this court. There have been various *dicta* to the contrary, but the cases, when carefully examined, will be found to have had all the prerequisites necessary to sustain the bonds, according to my view of the case. This view was distinctly announced by this court in the case of *Lynde v. The County of Winnebago*, 16 Wall. 13. In the case now under consideration, there is a sufficient recital in the bond to show that the proper election was held and the proper vote given; and the bond was executed by the officers whose duty it was to ascertain these facts. On this ground, and this alone, I concur in the judgment of the court."

In the same case Mr. Justice Strong, in the main opinion, after resting the judgment on the principle stated in the text, makes this reference to the case of *Knox County v. Aspinwall*:

"Indeed, some of our decisions have gone farther. In the leading case of *Knox County v. Aspinwall*, 21 How. 544, the decision was rested upon two grounds. One of them was that the mere issue of the bonds containing a recital that they were issued under and in pursuance of the legislative act, was a sufficient basis for an assumption by the purchaser that the conditions on which the county (in that case) was authorized to issue them had been complied with, and it was said the purchaser was not bound to look farther for evidence of such compliance, though the recital did not affirm it. This position was supported by reference to the *Royal British Bank v. Turquand*, 6 Ellis & Blackburn, 327, a case in the Exchequer Chamber, which fully sustains it, and the decision in which was concurred in by all the judges. This position taken in *Knox County v. Aspinwall*, has been more than once reaffirmed in this court. It was in *Moran v. Miami County*, 2 Black, 732; in *Mercer County v. Hackett*, 1 Wall. 83; in *Supervisors v. Schenk*, 5 Wall. 784, and in *Meyer v. Muscatine*, 1 Wall. 384. It has never been overruled, and whatever doubts may have been suggested respecting its correctness to the full extent to which it has sometimes been announced, there should be no doubt of the entire correctness of the other rule asserted in *Knox County v. Aspinwall*. That, we think, has been so firmly seated in reason and authority that it cannot be shaken."

In further explanation we may remark that the *recital* in *Knox County*

tion as to compliance with conditions precedent—particularly in respect of the very common one of a previous election or the assent of a given proportion of the tax-payers—a brief reference may be made to some of the most recent decisions of the Supreme Court, in which it is evident that the whole subject again underwent thorough consideration. In *Humboldt Township v. Long*, bonds issued under legislative authority requiring a popular vote at an election of which thirty days notice were to be given, and which contained a recital (made by the officers having the power, as construed, to determine whether the conditions of fact had been complied with and to issue the bonds) to the effect that they were “issued *in pursuance of and in accordance* with the act of the legislature,” stating it, were held not invalid in the hands of a holder for value, before due, without notice, because the election was held within less than thirty days after the date of the order providing for it.³¹

v. Aspinwall was in these words: “This bond is *issued* in part payment of a subscription of \$200,000, by the said Knox county, to the capital stock, etc., by order of the board of commissioners *in pursuance* of the 3d section of the act, etc., approved January 15, 1849.” The act required the previous sanction of a majority of the qualified voters of the county, and the defence was failure to comply with the statute in respect to the *notices* for the election. And the proposition which has been doubted elsewhere, and from which Mr. Justice Bradley dissents, is contained in the following sentence extracted from the opinion of Mr. Justice Nelson in that case, who, after quoting the foregoing recital in the bond (which it will be seen does not *expressly* state that there was an election), says: “The purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of the power.” In *Moran v. Miami County*, 2 Black, 722, 732, the court say: “We think and adjudge that the recitals in the bonds are conclusive [of compliance with the precedent condition], constituting an estoppel *in pais* upon the defendants in this suit.” Other cases to the same effect in the Supreme Court will be adverted to as we proceed. In *Marcy v. Oswego Township*, U. S. Sup. Court, Oct. Term, 1875, 3 Cent. Law Jour., 389, the doctrine as contained in the text was reasserted almost in the same language.

³¹ *Humboldt Township v. Long*, U. S. Sup. Court, Oct. Term, 1875, 3 Cent. Law Jour. 494. The court thus states the ground of its decision: “The board of county commissioners, who caused the bonds to be issued, were constituted the authority to determine whether the conditions of fact, made by the statute precedent to the exercise of

The principle adopted and the reasoning of the court by which it is sustained, lead, it would seem, logically to the conclusion (although there is, perhaps, no case in the Supreme Court where the *facts* required a direct decision of the point) that where the power to issue the bonds is given upon the condition of a previous vote in favor of the proposition, that the public or municipal officers can, *where no vote whatever has been taken, or the proposition has been voted down*, bind the county or municipality by the *false recitals* in such unauthorized bonds, provided they are issued by the officers entrusted by the statute with the power. Under this doctrine, limitations upon the exercise of the power intended to prevent fraud and to secure a compliance with the conditions upon which the bonds are authorized, are of little practical value, and generally prove illusory.

So in *Coloma v. Evans, supra*—a case from Illinois—the authority granted to execute and issue the bonds, had been performed, and their recital in the bonds issued by them is conclusive in a suit against the township brought by a *bona fide* holder." (So held in *Marcy v. Township of Oswego*, at this term, 3 Cent. Law Jour. 389; see *infra*, sec. 13.) "In so ruling we but decided what had often before been decided, and what ought to be regarded as a fixed rule. Applying it to the solution of the question now before us, it is plain that the bonds are not invalid because *all the notice* of the popular election was not given which the legislative act directed. The election was a step in the process of execution of the power granted to issue bonds in payment of a municipal subscription to the stock of a railroad company. It did not itself confer the power. Whether that step had been taken or not, and whether the election had been regularly conducted, with sufficient notice, and whether the requisite majority of votes had been cast in favor of a subscription, and consequent bond issue, were questions which the law submitted to the board of county commissioners and which it was necessary for them to answer before they could act. In the present case the board passed upon them and issued the bonds, asserting by the recitals that they were issued 'in pursuance of and in accordance with the act of the legislature.' Thus the plaintiff below took them, without knowledge of any irregularities in the process through which the legislative authority was exercised, and relying upon the assurance given by the board that the bonds had been issued in accordance with the law. In his hands, therefore, they are valid instruments." See *Town of Elmswood v. Marcy*, U. S. Sup. Court, Oct. 1, 1875, see *infra*, sec. 13; *St. Joseph Township v. Rogers*, 16 Wall. 644, 664, 1872.

local officers of the town were empowered by the statute to issue bonds, provided a majority of the voters of the town voted for the subscription, which fact, the statute provided, shall appear by the statement of the town clerk, filed with the county clerk, showing the vote given, the amount voted, and the rate of interest: it was held in favor of a *bona fide* owner of the bonds issued containing a recital of an election, that such an owner need not look beyond the recitals made in the bonds by the local officers authorized to issue them for evidence of the existence of the facts *in pais* thus recited, the decision and declaration of that decision in the bonds being conclusive upon the town. The court said: "After all, this is not an open question, as between a *bona fide* holder of the bonds and the township, whether all the prerequisites to their issue have been complied with. Apart from and beyond the reasonable presumption that the officers of the law, the township officers, discharged their duty, the matter has passed into judgment. The persons appointed to decide whether the necessary prerequisites to their issue had been completed have decided and certified their decision. They have declared the contingency to have happened on the occurrence of which the authority to issue the bonds was complete. Their recitals are such a decision, and beyond those a *bona fide* purchaser is not bound to look for evidence of the existence of things *in pais*. He is bound to know the law conferring upon the municipality power to give the bonds on the happening of a contingency, but whether that has happened or not is a question of fact, the decision of which is by the law confided to others, to those most competent to decide it, and which the purchaser is, in general, in no condition to decide for himself."

SEC. 12. *Condition precedent—Onus probandi—Estoppel by recital.*—In another important case, it appeared that legislative authority was given to certain officers of a town to borrow money to aid the building of a railway, and to issue bonds therefor, provided the written assent of two-thirds of the resident tax-payers should be previously obtained by said town officers and filed in the county clerk's office, with an

affidavit of such officers verifying such assent. A list of assenting tax-payers was filed in the clerk's office, and also the required affidavit; bonds were issued and were in the hands of a holder for value: on the trial the question arose whether the plaintiff must prove the signatures to the assent to be genuine, and it was held by the Supreme Court of the United States, denying *Starin v. Genoa*, and *Gould v. Sterling*, 23 N. Y. 439, 456, that no such *onus* rested on him; that the town officers were created a tribunal to determine whether two-thirds of the resident tax-payers had assented, and that on their decision the purchaser might rely without looking further, and that the town was concluded, in favor of an innocent holder, from denying that the condition precedent had been performed.³²

³² *Town of Venice v. Murdock*, U. S. Sup. Court, Oct. Term, 1875. 3 Cent. Law Jour. 322. In *The People v. Mead*, 36 N. Y. 224, 1867, the decision in *Starin v. Genoa* and *Gould v. Sterling* was adhered to by the Court of Appeals of New York, although the court admitted it was contrary to the decisions of the Supreme Court of the United States as to the evidence of the assent of the tax-payers. In *Venice v. Murdock*, *supra*, Mr. Justice Strong, speaking of *Starin v. Genoa* and *Gould v. Sterling*, says: "These decisions are in conflict with the rulings of this court in *Bissell v. Jeffersonville*, 24 How. 287; *Knox County v. Aspinwall*. 21 How. 539; *Mercer County v. Hackett*, 1 Wall. 83, and other cases which we have cited. They are in conflict also with decisions in other state courts. *Society for Savings v. New London*, 29 Conn. 174; *Railroad Company v. Evansville*, 15 Ind. 395; *Commissioners v. Nichols*, 14 Ohio (N. S.) 360. We have carefully considered the reasons given for the judgments in the New York cases, without being convinced by them. They ignore the paramount purpose for which the bonds were authorized by the legislature, and they treat the written assent of the taxables as the authority to the township officers, when, in fact, the power was given by the legislature, and it was only left to the town to determine by the action of two-thirds of the resident taxables whether the supervisors and commissioners might act under the power. In *Gould v. Sterling* the legislative act required no affidavit to be filed with a statement of the assenting tax-payers, and in *Starin v. Genoa* the affidavit filed was regarded as merely verifying that the persons whose names appeared on the assents comprised two-thirds of all the resident tax-payers. But it is obvious that if no more than this was meant by the required affidavit, it was wholly useless, for the assessment rolls of the township would have shown as much." And the rule, as stated in *Dillon on Munic. Corp.*

SEC. 13. *Estoppel by recital to set up defence of an over-issue contrary to the enabling act.*—Among the limitations, or attempted limitations, upon the exercise of the power to issue bonds, one not unfrequently provided is, that the amount voted or issued shall not exceed a specified proportion of the taxable property of the municipality, or such a sum as will require a greater levy of taxes than a specified rate on the taxable property to pay the annual interest on the bonds. The effect of a disregard of this limitation by the officers entrusted by the statute with the exercise of the power, came for the first time before the Supreme Court at the October term, 1875, in a case arising under the legislation of Kansas.³³

secs. 418, 419, is approved. The case, *Venice v. Murdock*, is so important in overturning, so far as the Federal courts are concerned, the judgment of the Court of Appeals of New York, and as respects the proposition it establishes, that we reproduce the additional reasons given by the Supreme Court in support of its judgment: "It is very obvious," says Strong, J., "that if the act of the legislature which authorized an issue of bonds in aid of the construction of the railroad on the written assent of two-thirds of the resident tax payers of the town intended that the holder of the bonds should be under obligation to prove by parol evidence that each case of the two hundred and fifty-nine names signed to the written assent was a genuine signature of the person who bore the name, the proffered aid to the railroad company was a delusion. No sane person would have bought a bond with such an obligation resting upon him whenever he called for payment of principal or interest. If such was the duty of the holder, it was always his duty. It could not be performed once for all. The bonds retained in the hands of the company would have been no help in the construction of the road. It was only because they could be sold that they were valuable. Only thus could they be applied to the construction. Yet it is not to be doubted the legislature had in view and intended to give substantial aid to the railroad company, if a sufficient number of the tax-payers assented. They must have contemplated that the bonds would be offered for sale, and it is not to be believed they intended to impose such a clog upon their salableness as would rest upon it if every person proposing to purchase was required to enquire of each one whose name appeared to the assent whether he had in fact signed it."

³³*Marcy v. Township of Oswego*, MSS. U. S. Sup. Court, Oct. term, 1875, 3 Cent. Law Jour. 389. The legislative provision is essential to an accurate understanding of the judgment and view of the court. The act of the legislation under which the bonds purported to have been issued.

The bonds were duly executed, and contained a *recital* of the act, and that they were issued "*in virtue of and in accordance*" with it, and "*in pursuance of and in accordance with the vote* of three-fifths of the legal voters of the township, at an election to be held on" a specified day. The plaintiff was a *bona fide* holder for value, without notice. The defence was that they were voted and issued at one time, as one act, and in payment of one subscription *in excess* of the amount authorized by the statute. The circuit justice of the United States for the circuit distinguished the case from Knox County v. Aspinwall, before referred to, on the ground that the statute imposing the limitation, the order for the election, the proposition submitted, the order for the issue of the bonds and the latest assessment roll were not, properly, matters *in pais*, but were all public, all open and all accessible, and all of record, and if consulted by the purchaser would have shown the bonds to have been voted and issued in violation of the express limitation upon the power contained in the statute. But the judgment of the circuit court was reversed, three judges dissenting, and the defence held unavailing. The case was considered to fall within the principle of the previous decisions. Mr. Justice Strong, speaking for the court, after stating the facts, as we have

was passed February 25, 1870. Laws of Kansas, 1870, p. 189. The first section enacted that whenever fifty of the qualified voters, being freeholders, of any municipal township in any county should petition the board of county commissioners of such county to submit to the qualified voters of the township a proposition to take stock in the name of such township, in any railroad proposed to be constructed into or through the township, designating in the petition, among other things, the amount of stock proposed to be taken, it should be the duty of the board to cause an election to be held in the township to determine whether such subscription should be made; provided, that the amount of bonds voted by any township should not be above such a sum as would require a levy of more than one per cent. per annum on the taxable property of such township to pay the yearly interest. The second section directed the board of county commissioners to make an order for holding the election contemplated in the preceding section, and to specify therein the amount of stock proposed to be subscribed, and also to prescribe the form of the ballots to be used. The fifth section enacted that

given them, observed: "In view of these facts, and of the decisions heretofore made by this court, the question can not be considered an open one. We have recently reviewed the subject in the case of *The Town of Coloma v. Evans*, (*supra*, sec. 10,) and re-asserted what had been decided before, namely, that where legislative authority has been given to a municipality to subscribe for the stock of a railroad company, and to issue municipal bonds in payment of the subscription, on the happening of some precedent contingency of fact, and where it may be gathered from the legislative enactment that the officers or persons designated to execute the bonds were if three-fifths of the electors voting at such election should vote for the subscription, the board of county commissioners should order the county clerk to make it in the name of the township, and should cause such bonds as might be required by the terms of the vote and subscription to be issued in the name of such township, to be signed by the chairman of the board, and attested by the clerk under the seal of the county.

In *Marcy v. Township of Oswego*, *supra*, bonds to which the coupons were attached contained the following *recital*: "This bond is executed and issued by virtue of, and in accordance with, an act of the legislature of the said state of Kansas, entitled 'An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same, approved February 25th, 1870,' and in pursuance of and in accordance with the vote of three-fifths of the legal voters of said township of Oswego, at a special election duly held on the 17th day of May, A. D. 1870." Each bond also declared that the board of county commissioners of the county of Labette, of which county the township of Oswego is a part, had caused it to be issued in the name and in behalf of said township, and to be signed by the chairman of the said board of county commissioners and attested by the county clerk of the said county, under its seal. Accordingly, each bond was thus signed, attested and sealed. The bonds were registered in the office of the state auditor, and certified by him in accordance with the provisions of an act of the legislature. His certificate on the back of each bond declared that it had been regularly and legally issued; that the signatures thereto were genuine, and that it had been duly registered in accordance with the act of the legislature.

The defence to the bonds was that there had been an *over-issue*, contrary to the statute. The bond, it will be observed, contains no statement on this point, but it was held by the Supreme Court that the recital in the bonds estopped the township from making this defence against a *bona fide* holder.

The case of *Marcy v. Township of Oswego* was cited and approved in

invested with power to decide whether the contingency had happened, or whether the fact existed which was a necessary condition precedent to any subscription or issue of the bonds; their decision is final in a suit by the *bona fide* holder of the bonds against the municipality, and a recital in the bonds that the requirements of the legislative act have been complied with is conclusive. And this is more emphatically true when the fact is one peculiarly within the knowledge of the persons to whom the power to issue the bonds has been conditionally granted."³⁴

Humboldt Township v. Long, decided at the same term, the court observing:

"There is no essential difference between this case and that. The assessment rolls of the township may have been proper evidence for consideration of the board of county commissioners when they were enquiring what the value of the taxable property of the township was, but the bonds are not invalid in the hands of a *bona fide* holder on reason of their having been voted and issued in excess of the statutory limit, as shown by the rolls. Whatever may be the right of the township as against those who issued the bonds, it cannot be set up against a *bona fide* holder of the bonds that the amount issued was too large, in face of the decision of the board, and their recital that the bonds were issued pursuant to and in accordance with the act of 1870." See *supra* sec. 11 and note.

³⁴ In the dissenting opinion of Mr. Justice Miller, (with whom concur Davis and Field, JJ.,) the view of the court is strongly combatted. A full extract will show the opinion of the dissentients, and bring into clear relief the views of the court:

"In the cases under consideration," says Miller, J., "this provision of the statute was wholly disregarded. I am not sure that the relative amount of the bonds, and of the taxable property of the towns, is given in these cases with exactness, but I do know that in some of the cases tried before me last summer in Kansas, it was shown that the first and only issue of such bonds exceeded in amount the entire value of the taxable property of the town, as shown by the tax list of the year preceding the issue. This court holds that such a showing is no defence to the bonds, notwithstanding the express prohibition of the legislature. It is therefore clear that so long as this doctrine is upheld, it is not in the power of the legislature to authorize these corporations to issue bonds under any special circumstances, or with any limitation in the use of their power, which may not be disregarded with impunity. It may be the wisest policy to prevent the issue of such bonds altogether. But it is not for this court to dictate a policy for the states on that subject. The re-

These cases afford, perhaps, a more striking illustration than any previously decided by that court, that the purchaser may implicitly rely upon the recitals in the bonds made by the proper officers, that the authority to issue them has arisen, of the decision is a most extraordinary one. It stands alone in the construction of powers specifically granted, whether the source of the power be a state constitution, an act of the legislature, a resolution of a corporate body, or a written authority given by an individual." * * * * "No such principle has ever been applied by this court, or by any other court, to a state, to the United States, to private corporations or to individuals. I challenge the production of a case in which it has been so applied. In the Floyd Acceptance Cases, 7 Wall. 666, in which the secretary of war had accepted time drafts drawn on him by a contractor, which, being negotiable, came into the hands of *bona fide* purchasers before due, we held that they were void for want of authority to accept them. And this case has been cited by this court more than once without question. No one would think for a moment of holding that a power of attorney made by an individual cannot be so limited as to make anyone dealing with the agent bound by the limitation, or that the agent's construction of his power bound the principal. Nor has it ever been contended that an officer of a private corporation can, by exceeding his authority, when that authority is express, is open and notorious, bind the corporation which he professes to represent. The simplicity of the device by which this doctrine is upheld as to municipal bonds is worthy the admiration of all who wish to profit by the frauds of municipal officers. It is, that whenever a condition or limitation is imposed upon the power of those officers in issuing bonds, they are the sole and final judges of the extent of those powers. If they decide to issue them, the law presumes that the conditions on which their powers depended existed, or that the limitation upon the exercise of the power has been complied with; and especially and particularly if they make a *false recital* of the fact on which the power depends in the paper they issue, this false recital has the effect of creating a power which had no existence without it. This remarkable result is always defended on the ground that the paper is negotiable, and the purchaser is ignorant of the falsehood. But in the Floyd Acceptance Cases, this court held, and it was necessary to hold so there, that the enquiry into the authority by which negotiable paper was issued was just the same as if it were not negotiable, and that if no such authority existed, it could not be aided by giving the paper that form. In county bonds it seems to be otherwise. In that case the court held that the party taking such paper was bound to know the law as it affected the authority of the officer who issued it. In county bond cases, while this principle of law is not expressly contradicted, it is held that the paper, though issued without authority of law, and in opposition to its express

and that he is under no obligation to consult the records of the municipality, and is not charged with constructive notice of their contents; and this, too, it will be observed, where the recital in the bond was general, and not specific in its nature, and where the facts which would have shown the issue of the bonds to have been illegal were matters appearing upon the public records of the township.

provisions, is still valid. There is no reason in the nature of the condition on which the power depends in these cases why any purchaser should not take notice of its existence before he buys. The bonds in this case were issued at one time, as one act, of one date and in payment of one subscription. All this was a matter of record in the town where it was done.

"So, also, the valuation of all the property of the town for the taxation of the year before the bonds were issued is of record both in that town and in the office of the clerk of the county in which the town is located. A purchaser had but to write to the township clerk or the county clerk, to know precisely the amount of the issue of bonds and the value of the taxable property within the township. In the matter of a power depending on these facts, in any other class of cases, it would be held that before buying these bonds, the purchaser must look to those matters on which their validity depended. They are all public, all open, all accessible,—the statute, the ordinance for their issue, the latest assessment roll. But in favor of a purchaser of municipal bonds, all this is to be disregarded, and a debt contracted without authority, and in violation of express statute, is to be collected out of the property of the helpless man who owns any in that district. I say helpless advisedly, because these are not *his* agents. They are the officers of the law; appointed or elected without his consent, acting contrary, perhaps, to his wishes. Surely if the acts of any class of officers should be valid only when done in conformity to law, it is those who manage the affairs of towns, counties and villages, in creating debts which not they, but the property owners, must pay." * * * "It is easy to say, and looks plausible when said, that if municipal corporations put bonds on the market, they must pay them when they become due. But it is another thing to say, that when an officer created by the law exceeds the authority which that law confers upon him, and in open violation of law issues these bonds, the owner of property lying within the corporation must pay them, though he had no part whatever in their issue and no power to prevent it. This latter is the true view of the matter. As the corporation could only exercise such power as the law conferred, the issuing of the bonds was not the act of the corporation. It is a false assumption to say that the corporation put them on the market. If one of two innocent persons must

SEC. 14. *Estoppel by recital of matter of fact, e. g., date of subscription.*—The effect of recitals in the bonds, and of statements in the records of the county which issued the bonds, is considered in *The Town of Concord v. Portsmouth Savings Bank*.³⁵ A controlling question in the case was whether the power to subscribe for stock and issue bonds therefor, given by the act March 26, 1869, was annulled by the new constitution of the state (which took effect July 2, 1870) before the subscription was made or a valid contract to subscribe was completed. The court held that, in point of fact a legal and binding subscription was made, or agreed to be made, in December, 1869, and hence the defence of want of legal power failed; and it then proceeded to view the case as affected by *estoppel*, the plaintiff being a *bona fide* holder for value without notice of any defence. The court held that a recital in the bonds that the subscription was made in December, 1869, being the recital of a matter of fact, and a fact, too, peculiarly, if not exclusively, within the knowledge of the board of supervisors, estopped the county to set up that the subscription was not made until after July 2, 1870, when their authority to subscribe had expired.³⁶

suffer for the unauthorized act of the township or county officers, it is clear that he who could, before parting with his money, have easily ascertained that they were unauthorized, should lose, rather than the property holder, who might not know anything of the matter, or if he did, had no power to prevent the wrong."

³⁵ *Concord v. Portsmouth Savings Bank*, U. S. Sup. Court, Oct. Term, 1875.

³⁶ *Town of Concord v. Portsmouth Savings Bank*, Sup. Court U. S. Oct. Term, 1875. The point is so material that we subjoin the opinion—delivered by Strong, J.—on this point. He says: "There is, however, another consideration that is worthy of notice. The findings of the court are that the plaintiff below is a purchaser of the bonds for a valuable consideration, having purchased them before their maturity and without notice of any defence. They were executed by the president of the board of supervisors and the county clerk. They recite that they are issued by the county of Moultrie, 'in pursuance of the subscription of the sum of eighty thousand dollars to the capital stock of the Decatur, Sullivan and Mattoon Railroad Company, made by the board of supervisors of said county of Moultrie, in December, A. D., 1869, in conformity to the provisions of an act of the general assembly of the state of Illinois, ap-

SEC. 15. *What constitutes completed subscription or contract to subscribe.*—Interesting questions have arisen as to what constitutes a subscription on the part of a municipality or other public corporation, or a valid contract to subscribe, to the stock of a railroad company, and when rights are vested thereunder which cannot be legislatively impaired without the consent of the parties in interest. Where a precedent popular vote is required, and upon such vote authority is

proved March 26, A. D., 1869.' Now, if it be supposed that the purchaser of bonds with such recitals was bound to look further and enquire what was the authority for the issue, where was he to look? Had he looked to the act of the general assembly of March 26, 1869, he would have found plenary authority for a stock subscription and for the issue of bonds in payment thereof. If he was bound to know that the constitutional provision terminated that authority after July 2, 1870, he knew that any subscription made before that time continued binding notwithstanding the constitution, and that bonds issued in payment of it were, therefore, lawful. If, then, he had enquired whether a subscription had been made before July 2, 1870, at the only place where enquiry should have been made, namely, at the records of the board, he would have found an order to subscribe, equivalent to a subscription made, in December, 1869, corresponding with the assertions of the recitals, and declared by them to have been a subscription. He could have made enquiry nowhere else with any prospect of learning the truth. Every step he could have taken assured him that the recitals were true. How, then, can the county be permitted to set up against a *bona fide* holder of the bonds, that the authority to make a subscription, with all its legitimate consequences, had expired before the subscription was made, in the face of the recitals and of the county records? Whether it had expired was a matter of fact, not of law, and it was peculiarly, if not exclusively, within the knowledge of the board of supervisors. After having assured a purchaser that their subscription was made in December, 1869, when they had power to make it, it would be tolerating a fraud to permit the county to set up, when called upon for payment, that it was not made until after July 2, 1870, when their authority expired."

Purchaser not affected by statements in county records contrary to recitals in the bonds issued by the county. *Nicolay v. St. Clair County*, 3 Dillon, C. C. R. 163, 1874. In *Aller v. Cameron*, *Ib.* 198, the defendant town was held estopped to set up against a holder of its bonds for value, that it was *not legally incorporated*.

Effect of recital by authorized officers. See also *Chambers County v. Clews*, 21 Wall. 317, 321; *Grand Chute v. Winegar*, 15 Wall. 355; *Lynde v. County of Winnebago*, 16 Wall. 6; *Railroad Co. v. Otoe*

given to subscribe for the stock, the vote without more does not constitute a contract between the municipality thus authorized to subscribe and the railroad company.³⁷

SEC. 16. *Same—Power may be annulled by constitutional provision or legislative action before rights become vested.*—As illustrating the necessity of a continued existence of the *power* to issue the bonds, and as showing what did *not* amount to a completed contract before the power was repealed by a constitutional provision, the case of *The Town of Concord v. Portsmouth Savings Bank* may usefully be referred to.³⁸ Chronologically stated, the facts were these: The bonds were issued under the act of March 7, 1867, and so recited. The act enacted that certain incorporated towns and cities, and towns acting under the township organization law, (among which it was conceded the town of Concord was one,) should be and were severally authorized to *appropriate* such sum of money as they might deem proper to the Chicago, Danville and Vincennes Railroad Company, to aid in the construction of the road of said company; to be paid to

County, 16 Wall. 667; *Mercer County v. Hackett*, 1 Wall. 83; *Woods v. Lawrence County*, 1 Black, 386; *Gelpcke v. Dubuque*, 1 Wall. 175; *Meyer v. Muscatine*, Ib. 384; *Kennicott v. Supervisors*, 16 Wall. 464.

³⁷ *Aspinwall v. County of Jo Daviess*, 22 How. 364. *Supra*, sec. 14; *infra*, secs. 16, 17; *Town of Concord v. Portsmouth Savings Bank*, *infra*; *Harshman v. Bates County*, 3 Dillon, C. C. R. 150, 162, note; s. c. affirmed in Supreme Court, October Term, 1875. Dillon, *Munic. Corp.* (2d Ed.) sec. 42 and cases cited.

The *rights of a municipality as a stockholder* in a railroad company, and whose stock has been paid for by the bonds of the municipality, are no greater than the rights of other stockholders, and unless *specially* authorized by the legislature, the railroad company has no power, when receiving the subscription and bonds, to agree to put the municipality in a better position than other stockholders, as, for example, by agreeing to pay a fixed rate of interest on such stock, equivalent in amount to the interest on the municipal bonds issued in payment therefor. *Pittsburgh etc. R. R. Co. v. Alleghany County*, Sup. Court Pa. Nov. 15, 1874, 3 Cent. Law Jour. 204. Instance in which there was legislative authority for such a contract, see case of the *Pittsburgh and Connelsville R. R. Co.*, 13 P. F. Smith, (Pa.), 126.

³⁸ *Concord v. Portsmouth Savings Bank*, U. S. Sup. Court, Oct. Term, 1875; see *infra* sec. 17.

the company as soon as the track of said road should have been located and constructed through said city, town or township respectively. To this was attached the following proviso: "Provided, however, that the proposition to *appropriate* moneys to said company shall be first submitted to a vote of the legal voters of said respective townships, towns or cities, at a regular annual or special meeting, by giving at least ten days' notice thereof; and a vote shall be taken thereon by ballot at the usual place of election, and if the majority of votes cast shall be in favor of the *appropriation*, then the same shall be made; otherwise not." The second section empowered and required the authorities of said municipalities to levy and collect a tax, and make such provisions as might be necessary for the prompt payment of the *appropriation* under the provisions of the law.

The town voted on the 20th day of November, 1869, that it would make a donation, provided the company would run its railroad through the town. On the 20th of June, 1870, the company gave notice of its acceptance of the donation.

On the 2d day of July, 1870, the new constitution of the state went into operation, by which it was ordained that "no city, town, township or other municipality shall ever become *subscribers* to the capital stock of any railroad or private corporation, *or* make *donation* to, or loan its credit in *aid* of, such corporation. Provided, however, that the adoption of this article shall not be construed as affecting the *right* of any such municipality to make such *subscriptions*, where the same have been authorized under existing laws, by a *vote* of the people of such municipalities prior to such adoption."

On the 9th day of October, 1871, the bonds in suit were executed and delivered as a donation to the railroad company, and the question was whether there was then *any* existing authority to make the donation and issue the *bonds*. The Supreme Court, after pointing out that the authority given to the town of Concord by the act of March 7, 1867, (*supra*) was, not to subscribe for stock, but to make *an* appropriation or donation, which distinction is also taken in the provision of the constitution above quoted, held that no

donation could be made, under the act of 1867, until after the completion of the location and construction of the road through the town: that the vote of November 20, 1869, in favor of an appropriation was not an appropriation or donation; that the power to make such donation was annulled by the constitution on July 2, 1870, and that there was at that date no contract *in esse* between the town and the railroad company which stood in the way of the operation of the constitutional prohibition. As to the effect of the vote of the town, of November 20, 1869, and the acceptance of the railroad company, of June 20, 1870, (both of which, it will be observed, were before the constitution went into operation,) the court observed: "But the town was not empowered to make the donation until the road was located and constructed through the town. It had no authority to make a contract to give. And the acceptance was an undertaking to do nothing which the company was not bound to do before the authority of the town to make a donation, or to engage to make a donation, came into existence. What is called the acceptance of the railroad company cannot be construed as an engagement to locate and build the railroad through the town. It amounted to no more than saying, 'If we build our road through your town, we will receive your gift.' There was, therefore, no consideration for the town's promise to give, even if the popular vote can be considered a promise. There was no contract to be impaired. A contract should be clearly proved before it invokes the protection of the federal constitution. We conclude, then, that at the time the donation was made, there was no authority in the municipality to make a donation to the railroad company, and consequently no authority to issue the bonds. It follows that the bonds and coupons are void."

SEC. 17. *Same—Mode of subscription—When subscription complete.*—Power by legislative act to the board of supervisors of a county to subscribe an amount not exceeding a given sum to the stock of a specified railroad company, and to issue bonds in payment therefor, without requiring the sanction of a popular vote, but with a proviso that the bonds

shall not be issued until the road is open for traffic, gives complete authority to the county to subscribe for the stock, or to make a binding agreement to subscribe therefor preparatory to a final subscription. The proviso that the payment of the subscription should be postponed until the railroad should be opened does not limit the power to subscribe or to enter into an agreement to make the subscription before the road is completed.

And it was held that a resolution of the board of supervisors, made when the power to subscribe existed or had arisen, that the county subscribe a given sum to aid in the construction of the road of the company, without any subscription on the books of the company, amounted to a subscription, or, at all events, to a legal undertaking to subscribe, which, when assented to or accepted by the company, became a binding contract, which the county could not revoke, and which could not be impaired by any subsequent prohibition of the constitution or the legislature, without the assent of the railroad company.³⁹

But before any subscription is made, or before any contract to subscribe is completed, the authority to subscribe may be repealed or taken away by legislative or constitutional provision. And if the authority to subscribe depends upon a precedent vote of the people, the *vote*, without a subscription or an agreement to subscribe, does not create a contract, nor preclude the repeal of the authority to make the subscription.⁴⁰

³⁹ Town of Concord v. Portsmouth Savings Bank, U. S. Sup. Court, Oct. Term, 1875. Compare *supra*, sec. 16.

⁴⁰ Aspinwall v. County of Jo Daviess, 22 How. 364, 1859; U. P. R. R. Co. v. Davis Co., 6 Kansas, 256, 1870; Dillon on Munic. Corp. secs. 42, 696, note, and cases there cited; Harshman v. Bates County, 3 Dillon, C. C. R. 162, note. The law on this subject is thus stated and the cases referred to and distinguished, by Mr. Justice Strong, in The Town of Concord v. Portsmouth Savings Bank, *supra* :

" This case [although between the same parties] differs very materially from the case of The Town of Concord v. The Portsmouth Savings Bank, No. 43, of this term. [*Supra*, sec. 16.] In that, we held that the bonds were void because the legislative authority to issue them as a do-

SEC. 18. *Same—Completed subscription—Effect of consolidation of railway companies on validity of subscription.*—The authority to make a subscription and to issue bonds in payment therefor may, if it has never been executed, be revoked by any event which has the legal effect to extinguish the power. Thus where the power to subscribe depends upon a precedent popular vote, and the vote is had in favor of Company A, which under a general law of the state consolidated with Company B, and formed thereby a new company, C, which consolidation was effected *before* any subscription or contract for subscription was made, and the only subscription

nation to the railroad company had been annulled by the constitution of the state before the donation was made." * * * "But a subscription on the books of the company was unnecessary, for that which amounted to a subscription had been made in December, 1869. The authorized body of a municipal corporation may bind it by an ordinance, which, in favor of private persons interested therein, may, if so intended, operate as a contract, or they may bind it by a resolution, or by vote clothe its officers with power to act for it. The former was the clear intention in this case. The board clothed no officer with power to act for it. The resolution to subscribe was its own act; its immediate subscription. *Western Saving Fund Society v. The City of Philadelphia*, 31 Penn. St. 174; *Sacramento v. Kirk*, 7 Cal. 419; *Logansport v. Blakemore*, 17 Ind. 318. In *The Justices of Clarke County Court v. The Paris, Winchester and Kentucky River Turnpike Co.*, 11 Ben. Monroe, 143, it was ruled that an order of the county court, by which it was said the court subscribed, on behalf of Clarke county, for fifty shares of stock in the turnpike company, if concurred in by a competent majority of the magistrates, was itself a subscription, and bound the county. There was no subscription on the books of the company, but the court of appeals said, 'We cannot, therefore, regard this order as a mere offer or pledge to subscribe the fifty shares in this particular road, but as actually taking, and in substance and legal effect subscribing for that number of shares. So in *Nugent v. The Supervisors of Putnam County*, 19 Wall. 241, it was said that to constitute a subscription by a county to stock in a railroad company, it is not necessary that there be an act of manual subscribing on the books of the company. These cases lead directly to the conclusion that the action of the board of supervisors in December, 1869, was in substance and in legal effect a subscription. And if this conclusion could not be reached, it would make but little difference to the present case, for it could not be doubted that the action of the board was at least an undertaking to subscribe, and this was assented to or accepted by the

made was to the consolidated company, without any new election, it was held that the subscription was unauthorized, and that the bonds which recited these facts were void, even in the hands of a *bona fide* holder for value. The ground of the decision was that the authority to make the subscription ceased by the extinction of the company in whose favor the vote was had, such extinction being the legal consequence of the consolidation.⁴¹ This case differs from *Nugent v. The*

railroad company. The resolutions were entered of record by the clerk and president of the railroad company, and the company made an appropriation of the bonds to be received in payment of the subscription, by a contract made on the 15th of April, 1870. In either aspect of the case, therefore, there was an authorized contract existing between the county and the railroad company when the new constitution came into operation. No matter whether the contract was a subscription or an agreement to subscribe, it was not annulled or impaired by the prohibitions of the constitution. The delivery of the bonds was no more than performance of the contract. For these reasons, it is in vain to appeal to the decisions made in *Aspinwall v. The County of Daviess*, 22 How. 364, and *The Town of Concord v. The Savings Bank*, decided this term. In neither of those cases was there any contract made before the authority to make one was annulled. We do not assert that the constitutional provision did not abrogate the authority of the board supervisors to make a subscription for railroad stock. On the contrary, we think it did. But we hold that contracts made under the power while it was in existence were valid contracts, and that the obligations assumed by them continued after the power to enter into such contracts was withdrawn. The operation of the constitution was only prospective. Indeed, it is expressly ordained in its schedule that 'all rights, actions, prosecutions, claims and contracts of the state, individuals, or bodies corporate, shall continue to be as valid as if this constitution had not been adopted.' It is hardly necessary to say that, under the act of the general assembly, the authority to make a subscription was coupled with an authority and a duty to issue county bonds for the sum subscribed. No action of the board was needed after the subscription was made."

⁴¹ *Harshman v. Bates County*, Sup. Court U. S. Oct. Term, 1875, 3 Cent. Law Jour. 367. The grounds of the judgment of the court on this point are thus succinctly stated by Bradley, J.:

"Another objection to the validity of the subscription for which the bonds were given in this case is, that the township voted a subscription to one company and the county court subscribed to another. This is sought to be justified on the ground that the former company became consolidated with another, thereby forming a third, to whose stock the

Supervisors of Putnam County,⁴² in the material circumstance that in that case the subscription to one of the constituent companies was *before* the consolidation, while in this one it was *afterwards*. In this case there was nothing but a bare vote before the consolidation, which, without more, creates no contract between the municipality and the railroad company; while in the Putnam county case there was a subscription in addition to the vote, before the consolidation, and the right, having become vested in the railroad company, may be transferred to another on an authorized consolidation being effected. And where the consolidation is provided for or contemplated by the legislation of the state in force when the subscription is made, a subsequent consolidation, in pursuance of the enactment, does not have the effect to invalidate the subscription. This principle was distinctly settled

subscription was made. This consolidation was effected under a law of Missouri authorizing consolidations, and declaring that the company formed from two companies should be entitled to all the powers, rights, privileges and immunities which belong to either; and it is contended that this provision of the law justified the county court in making the subscription without further authority from the people of the township. But did not the authority cease by the extinction of the company voted for? No subscription had been made. No vested right had accrued to the company. The case of the State v. Linn County Court, 44 Mo. 504, only decides that if the county court refuses to issue bonds after making a subscription, a *mandamus* will lie to compel it to issue them. There the authority had been executed and a right had become vested. But so long as it remains unexecuted, the occurrence of any event which creates a revocation in law will extinguish the power. The extinction of the company in whose favor the subscription was authorized worked such a revocation. The law authorizing the consolidation of railroad companies does not change the law of attorney and constituent. It may transfer the vested rights of one railroad company to another, upon a consolidation being effected; but it does not continue in existence powers to subscribe for stock given by one person to another, which, by the general law, are extinguished by such a change. It does not profess to do so, and we think it does not do so by implication. As sufficient notice of these objections is contained in the recitals of the bonds themselves to put the holder on enquiry, we think that there was no error in the judgment of the circuit court; and it is, therefore, affirmed."

Same case in circuit court, 3 Dillon, C. C. R. 150.

⁴² Nugent v. The Supervisors of Putnam County, 19 Wall. 241.

in the Putnam county case just cited,⁴³ and such existing legislative authority to change the organization controlled the decision and constituted, in the judgment of the court, the ground of distinction between that case and the oft-cited case of *Marsh v. Fulton County*.⁴⁴

SEC. 19. *Must be a valid act as the basis of the power—Construction of special powers, see note.*—A purchaser of municipal bonds is bound, as has already been incidentally shown, to take notice of any provisions of the constitution or legislation of the state relating to the *power* of the municipality to issue them, and if the act conferring the power is in conflict with the constitution, the bonds are void, even in the hands of a *bona fide* holder for value.⁴⁵

⁴³ 19 Wall. 241. The principle was followed and applied in *Thomas v. Scotland County*, 3 Dillon, C. C. R. 7, and in *Washburn v. Cass County*, 3 Dillon, C. C. R. 251, and the bonds held valid notwithstanding the consolidation.

⁴⁴ *Marsh v. Fulton County*, 10 Wall. 676.

⁴⁵ *Harshman v. Bates County*, U. S. Sup. Court, Oct Term, 1875, 3 Cent. Law Jour. 367. As the decision in this case is supposed to invalidate all the bonds issued under the Township Aid Act of Missouri, of March 23, 1868, said to amount to nearly \$3,000,000, the point on which the act was decided to be unconstitutional will be stated. The constitution of 1865 prohibited such subscriptions "unless two-thirds of the qualified voters of the" municipality issuing the bonds "shall assent thereto." Art. II, sec. 14. The Township Aid Act authorized the issue of bonds "if two-thirds of the qualified voters of the township voting at such election are in favor of the subscription." The Supreme Court hold that there is a broad difference between the constitution and the act—the former requiring the assent of two-thirds of the qualified voters of the municipality, while the latter only requires the assent of two-thirds of the qualified voters who vote at the election. Same case, in the court below, decided on another ground, the constitutional question, being made for the first time in the Supreme Court, is reported in 3 Dillon, C. C. R. 150.

Effect of constitutional provision adopted in 1870, on existing powers to aid railways in *Mississippi*. *Woodward v. Calhoun County*, (district court of U. S. for Mississippi, Hill, J.,) 2 Cent. Law. Jour. 396. In *Ohio*, *Cass v. Dillon*, 2 Ohio St. 607; *State v. Union Township*, 8 Ohio, 94. In *Missouri*, *State v. Sullivan County*, 51 Mo. 531; *Kansas City etc. R. R. Co. v. Aldermen etc.*, 47 Mo. 349; *State v. County Court etc.*, 48 Mo. 339; *State v. Macon County*, 41 Mo. 453; *Smith v. Clark County*, 54 Mo. 58; *State v. Green County*, 54 Mo. 540; *Thomas v. Scotland County*,

And the purchaser must also notice the provisions and extent of the legislative enactment on the subject.⁴⁶ Thus where authority was given to certain counties lying *north* of the Missouri river, a subscription made and bonds issued under such authority by a county *south* of the river are void in the hands of everybody.⁴⁷

3 Dillon, C. C. R. 7; Nicolay v. St. Clair County, Ib. 163; Hindekoper v. Dallas County, Ib. 171; Jordan v. Cass County, Ib. 185; Foster v. Callaway County, Ib. 201.

⁴⁶ *Infra*, sec. 20.

⁴⁷ Sherrard v. Lafayette County, 3 Dillon, C. C. R. 236, 1875; S. C. 2 Cent. Law Jour. 347. The case was briefly this: By an act of the legislature of Missouri, a company was incorporated with power to construct a railroad from the town of Louisiana, which is situated on the Mississippi river, *north* of the Missouri river, to a point on the Missouri river, and the county court of any county in which *any part of the route* of said road should lie was authorized to subscribe stock to the company, without a vote of the people. Afterwards the new constitution of Missouri went into effect, prohibiting the general assembly (1) from creating corporations by *special* act, except for municipal purposes; (2) from authorizing any county, etc., to become a stock-holder in, or loaning its credit to, any company, association or corporation, *unless two-thirds of the qualified voters should assent thereto*. Subsequently to this, the legislature passed an act purporting to *amend* the charter of the said railroad company, which provided that the county court of any county in which any part of the line of said railroad might be located might subscribe to the stock of said company and issue bonds, etc. Under this act, the county court of Lafayette county, a county lying wholly *south* of the Missouri river, issued, *without a vote of the people*, the bonds from which the coupons here sued on were detached, and several installments of interest had been paid on them: *Held*, 1. That the amendatory act from which authority to issue these bonds is claimed is a *special* act, in effect creating a new corporation, and is hence inhibited by the state constitution. 2. That it was not competent for the legislature, by extending the route of the proposed road beyond the point designated in the original charter, to authorize a county *south* of the Missouri river to incur indebtedness in aid of the road, without a two-thirds vote as required by the constitution. 3. That, since there was an entire want of power to issue the bonds, they were void even in the hands of innocent purchasers. 4. That the fact that the county court had paid interest on these bonds did not estop it from afterwards setting up their invalidity.

Construction of special power. The act which authorized the issuing of the bonds to pay the county subscriptions to a railway company directed that the bonds so issued should be made payable to "the presi-

SEC. 20. *Registration of bonds—Effect of fraudulent ante-dating.*—The history of the issue of municipal bonds in this country shows that conditions imposed by law requiring a popular vote, or conditions in the propositions submitted to the voters, intended to prevent fraud and to secure the actual building and completion of the roads, have been often evaded, and the bonds issued without compliance therewith. Such bonds, when negotiated for value, the courts, as we have seen, have held to be binding. To prevent such improper or improvident issue of bonds in the future, the legislatures of some of the states have passed acts requiring all bonds to be *registered* with some of the executive departments of the state before they are issued or negotiated. Thus in 1872⁴⁸ the legislature of Missouri, a state in which many fraudulent

dent and directors of the railroad company, and their successors and assigns." The bonds issued were made payable to "the railroad company or bearer." *Held*, that the power granted was sufficiently pursued, and that the bonds so issued were valid. *Woodward v. Calhoun County*, (U. S. Dist. Court for Mississippi, Hill, J.,) 2 Cent. Law Jour. 396, 1874.

Special act held to control general act. *R. R. Co. v. Otoe County*, 16 Wall. 667, 1872.

Power to donate bonds in lieu of lands and right of way. By various provisions of a city charter, the mayor and city council were authorized to make donations of land for the right of way and other privileges to a railroad company, and to expend money for the purpose of acquiring land to be given, and were authorized to borrow money to an unlimited extent, when instructed so to do by a popular vote, and, further, to issue bonds to fund any indebtedness of the city, existing or to be created. Under this authority, a railroad company, by reason of complying with certain conditions, became entitled to demand from the city the right of way and depot grounds. The company agreed with the city to accept the bonds voted to procure the right of way and grounds in lieu of the right of way and grounds, and it was held that the city had the power thus to agree, and that the bonds were valid. *Converse v. Fort Scott*, U. S. Sup. Court, Oct. Term, 1875, 3 Cent. Law Jour. 449.

A proposition once voted down may be subsequently re-submitted and adopted, unless the act evinces a contrary intention. *Society etc. v. New London*, 29 Conn. 174; *Smith v. Clark County*, 54 Mo. 58; *Woodward v. Calhoun County*, 2 Cent. Law Jour. 396.

Issue of bonds before law authorizing it took effect. *Phelps v. Bank*, 13 Wis. 432; *Berliner v. Waterloo*, 14 Wis. 378.

⁴⁸ Act of March 30, 1872, (Laws of Missouri, 1872, p. 56).

bonds had been issued, passed an act which provided that, "*before* any bond, hereafter issued by any county * * * shall *obtain validity or be negotiated*," it must be *first* registered by the state auditor, who shall certify thereon that all conditions precedent required by law, and by the contract under which the bonds were ordered to be issued, have been complied with. In the case of *Anthony v. Jasper County*,⁴⁹

⁴⁹*Anthony v. Jasper County*, U. S. Circuit Court, West. Dist. Mo. April Term, 1876, 3 Cent. Law Jour. 321. In delivering its judgment, the court said: "If the bonds bore date after the act of March 30, 1872, and had not been registered, it is plain, we think, that they would have no '*validity*,' and hence could not support an action in the hands of any person. But they are antedated, and the question is, whether they have validity in the hands of the innocent purchaser. Upon the best consideration we have been able to give, our conclusion is that the bonds can not be enforced. The case comes within the doctrine, which is well settled, that where a *statute* declares absolutely and without exception that a contract or bond or note is void, it is void into whosoever hands it may come. This statute declares that no unregistered bond shall be valid or be negotiated. Bonds must *first* be registered. Without registration they '*obtain no validity*.' Such is the statute. A declaration that bonds shall have no validity is equivalent to declaring them to be void. Is the county estopped to set up this defence? We think not. The case is to be distinguished, we think, from those decided by the Supreme Court of the United States, in which it is held that the frauds of the officers cannot be visited upon the innocent bond-holder, and falls within the principle of *Bayley v. Taber*, 5 Mass. 286. In that case it was held, where a statute enacted that promissory notes of a certain description, '*made or issued*' after a specified day, should be '*utterly void*, and no action should be sustained thereon,' that it was competent to the makers of such notes, when sued upon notes bearing date *before* the day fixed by the statute, to prove that they were, in fact, made and issued *after* such day. The principle of that case is the same as in the case at the bar, and if that is a sound principle when applied to the individual maker of prohibited paper, it should apply with at least equal force in favor of public bodies, where one or two officers, without the consent of the others, may, as in this case, combine to evade the law—the other officers being innocent of wrongful participation. The principle involved is one of great consequence. For illustration: Loose and general powers have been heretofore given in this state to municipalities and counties to issue such bonds. This power has been taken away by the new constitution. Can the protective provisions of that instrument be evaded and rendered useless by the mere fraudulent act of the officers of the county in ante-

it appeared that bonds were signed, sealed and issued in the manner above appearing, *after* this statute went into effect, and were antedated to a date prior to the passage of that enactment. In point of fact, the conditions on which the bonds had been voted had not been fully complied with; and hence they could not have been, and were not, certified by the auditor as registered bonds. The bonds found their way into the hands of an innocent holder for value, who did not know that the bonds bore a false date. The circuit court held that the bonds could not be enforced, and that the county was not estopped to set up the defence,—a decision which necessarily implied a distinction between such a case and those in which the Supreme Court of the United States had held that the county or municipality could not visit the frauds of their officers upon the innocent holders of the bonds. The case has gone to the Supreme Court of the United States, and it remains to be seen whether the distinction taken below will be adjudged sound.

SEC. 21. *Retrospective statutes validating irregular subscriptions and bonds.*—In the absence of special constitutional restrictions, the competency of the legislature to enact retrospective statutes to validate an irregular or defective execution of a power by a municipal or public corporation is undoubted.⁵⁰ And the power to cure defective subscriptions to the stock of railway companies and validate bonds issued therefor has been frequently exercised and judicially sustained.⁵¹

dating the bonds? If so, the power to defraud is endowed with a fearful vitality, which survives the prohibitions of the constitution, and threatens to become immortal."

Construction of Kansas Bond Registration Act. *January v. Johnson County*, 3 Dillon, C. C. R. 392.

⁵⁰ Cooley on Const. Lim. 371, and cases there cited; Dillon on Munic. Corp. secs. 46, 352, 424; *Ritchie v. Franklin County*, 22 Wall. 67, 1874; Cooley on Taxation, 223-232.

⁵¹ Dillon on Munic. Corp. (2d Ed.) sec. 424, and cases there cited. In *St. Joseph Township v. Rogers*, 16 Wall. 666, where it appeared that the election at which the subscription was approved was held before the passage of the law authorizing the subscription, the court said: "Argument to show that defective subscriptions of the kind may, in all cases, be ratified where the legislature could have originally conferred the power, is

SEC. 22. *General summary of doctrine of the Supreme Court as to estoppel by recitals.*—In passing from this portion of our subject, we may observe that if we have not mistaken the meaning and effect of the leading judgments of the Supreme Court which we have passed in review, they establish the fol-

certainly unnecessary, as the question is authoritatively settled by the decisions of the supreme court of the state (Illinois), and of this court in repeated instances." And again: "Mistakes and irregularities are of frequent occurrence in municipal elections, and the state legislatures have often had occasion to pass laws to obviate such difficulties. Such laws, when they do not impair any contract, or injuriously affect the rights of third persons, are never regarded as objectionable, and certainly are within the competency of legislative authority."

The constitution of Illinois of 1848, Art. IX, sec. 5, declared "that the *corporate authorities* of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same." The supreme court of the state (Marshall v. Siliman, 61 Ill. 218; Wiley v. Siliman, 62 Ill. 170—see Dillon on Munic. Corp. secs. 46, 352, 424) decided that, this section having been intended as a limitation upon the law-making power, the legislature could not grant the right of corporate taxation to any but the *corporate authorities*, nor *coerce* a municipal corporation to incur a debt by the issue of its bonds for corporate purposes. And the court held that an act validating an election, irregularly called and notified, to vote upon the question of township subscription, and declaring the same legal and binding, was void. In the opinion of the court, the act was an effort to confer the power of municipal taxation upon persons who were not, by themselves, the corporate authorities in the sense of the constitution, and to compel the town to issue its bonds for railroad stock, by declaring a void proceeding to be a valid subscription. The liability of the township on the same bonds afterwards came before the Supreme Court of the United States in *The Town of Elmwood v. Marcy*, Oct. Term, 1875, and a majority of the court not vindicating, nor, it would seem, approving, the decision of the supreme court of Illinois, nevertheless, as there had been, in their view, no conflicting decisions of that tribunal on the point, and as it involved the construction of a "peculiar provision of the constitution of Illinois," they felt bound to follow it, although it was made after the bonds in question had been issued. Clifford, Swayne and Strong, JJ., dissented, on grounds which would seem to be strongly supported in the previous decisions of the court. *Supervisors of Marshall County v. Schenck*, 5 Wall. 772; *Township of Pine Grove v. Talcott*, 19 Wall. 666, 677; *Railroad Co. v. County of Otoe*, 16 Wall. 667; *Olcott v. Supervisors*, *Ib.* 678; *infra* sec. 22, note.

lowing principles:—The purchaser is bound to see that there exists legislative authority not in conflict with the state constitution for the issue of the bonds or commercial securities of the municipal, public or *quasi* corporation, and is bound to notice the contents and recitals contained in the instruments; but if such bonds are duly executed by the proper officers, and if these officers are invested, by the true construction of the legislative enactment in that regard, with the power to decide whether conditions precedent have been performed, and the bonds contain a recital that such conditions have been complied with, or a recital which implies such compliance, whether the preliminary conditions consist of facts *in pais* or facts of record—the issue of the bonds, under such circumstances, with such a recital, is conclusive against the municipality as to the fact or facts recited or implied in the recital, and estops it, in an action by an innocent holder for value, before due, to show the contrary. This is the doctrine of the Supreme Court of the United States, and the point in which it differs from the general line of decisions in the State courts is in regard to the evidence of compliance with conditions precedent. In all the cases in the Supreme Court of the United States, that tribunal has held that the municipal or local officers were constituted the judges to decide whether antecedent or preliminary steps or conditions had been complied with, and that their decision stated or implied in the recital was conclusive against the corporate maker, when the bonds have found their way into the hands of innocent holders. The view which holds the local officers a tribunal to make so important a decision rests not upon any express declaration of the legislature to that effect, but is “gathered,” by construction, from the supposed intent and purpose of the legislature. Many of the State courts, but not all of them, have taken a somewhat different view. They agree that mere *irregularities*, not relating to the essence of the power, will not affect a *bona fide* holder; but inasmuch as there exists no general power to issue such securities, and as the fact of compliance or non-compliance with condition precedent is usually a matter of which there is a record, the

purchaser of such securities is bound to ascertain whether the power to issue them existed or had arisen, especially where this depends upon matters of which a record is required to be made. The subject is one full of difficulties. If the latter view is sustained, it has the effect to impair the ready salability and market value of the securities. If the former, it has the effect of enabling the local officers in power for the time being to perpetrate, without any effectual preventive in many cases, the most outrageous frauds. On principle, it would seem that the legislative intent to invest local officers, by means of a false recital, with a power so tremendous ought not to be held to exist, unless it is plainly declared or implied, and that more caution in the purchase of these securities than is required by the doctrine of the Supreme Court would promote the interests both of the maker and the purchaser.

And in this class of cases we may remark that the Supreme Court of the United States does not hold itself concluded by decisions of the State courts made *after* the bonds have been negotiated, unless, possibly, where the question is one exclusively depending upon the construction of local and peculiar provisions of the state constitution or enactments.⁵²

⁵² As to Iowa municipal bond cases and the conflict of opinion between State and Federal courts, see *King v. Wilson*, 1 Dillon, C. C. R. 555; *Gelpcke v. Dubuque*, 1 Wall. 175, and cases cited in Dillon on Munic. Corp. (2d. Ed.), sec. 416, *b*. See particularly on this point, *Olcott v. Supervisors*, 16 Wall. 678; *Butz v. Muscatine*, 8 Wall. 575, explained; *Supervisors v. United States*, 18 Wall. 71; *Chicago v. Sheldon*, 9 Wall. 50; *Pine Grove Township v. Talcott*, 19 Wall. 666; *Town of Elmwood v. Marcy*, U. S. Sup. Court, Oct. Term, 1875; *supra*, sec. 21, note, as to peculiar local legislative or constitutional provisions.

In speaking of the *force of the State court decisions* in the Federal courts in this class of cases, Mr. Justice Strong, in *Venice v. Murdock*, Oct. Term, 1875, holds this language :

" It is argued, however, that the New York decisions [*Starin v. Genoa*; *Gould v. Sterling*, 23 N. Y. 439, 456] are judicial constructions of a statute of that state, and, therefore, that they furnish a rule by which we must be guided. The argument would have force if the decisions, in fact, presented a clear case of statutory construction. But they do not. They are not attempts at interpretation. They would apply as well to

SEC. 23. *Laches, acquiescence, payment of interest and retaining the consideration as ground of estoppel.*—The cases we have heretofore considered were those in which the municipality has been held estopped by the recitals in the bonds to show that conditions precedent had not been complied with. We will now advert to *other grounds of estoppel* arising from the acquiescence or acts of the municipal authorities. It is undoubtedly a sound proposition that a municipal corporation, as well as a private corporation, may confirm acts, not *ultra vires*, which it may deem beneficial to it.

As experience shows that the officers of public and municipal corporations do not guard the interest confided to them with the same vigilance and fidelity that characterize the officers of private corporations, the principle of ratification by laches or delay should be more cautiously applied to the former than to the latter. But the principle applies to both classes of corporations, as well as to natural persons. The general doctrine is undoubted that there is ordinarily no estoppel in respect to acts which are in violation of the constitution, or of an act of the legislature, or which are obviously *ultra vires*. The history of the doctrine of *ultra vires* in Great

the execution of powers or authorities granted by private persons as they do to the issue of bonds under the statute of April 16, 1852. They assert general principles, to wit, that persons empowered to borrow money and give bonds therefor, for the purpose of paying it to an improvement company, are not authorized to deliver the bonds directly to the company, a doctrine denied in this court, in the supreme court of Pennsylvania, and even in the court of appeals of New York. *People v. Mead*, 24 N. Y. 124; *The Town of Venice v. Breed*, — N. Y. —. They assert, also, that where an authority is given to an officer to execute and issue bonds, (on the assent of two-thirds of the voters of a town, the assent to be obtained by the officer and filed in a public office, with an affidavit verifying the assent,) the verification amounts to nothing, subserves no purpose and that a *bona fide* holder of the bonds is bound to prove that the requisite number of voters did actually assent. They assert this as a general proposition. They do not assert that the statute so declares, or that such is even its implied requisition. There is, therefore, before us no such case of the construction of a state statute by State courts as requires us to yield our own convictions of the right and blindly follow the lead of others, eminent as we freely concede they are."

Britain and in this country makes it difficult to affirm that the rule is without exceptions; and it is the part of prudence and wisdom to keep close to the adjudications without undertaking to formulate, in advance, rules of universal application. As to *irregularities* in the exercise of an express power to issue bonds, and particularly in respect to steps connected with preliminary conditions, the failure of the municipality or tax-payer to enjoin the issue, followed by long acquiescence, especially when this is accompanied by affirmative acts which recognize the validity of the bonds, such as receiving and holding the stock or consideration for the bonds, or paying interest on them for a series of years, has been held to estop the municipality from defending, on the ground of non-compliance with conditions precedent, especially when the bonds, as is usually the case, have been negotiated for value. But there is no case yet decided by the Supreme Court which holds the corporation estopped from setting up a total want of power to issue the bonds. The leading cases on this subject in the Supreme Court are referred to in the note.⁵³

⁵³ As to the effect of *failure to enjoin* the issue of the bonds and of acquiescence in the irregular exercise of the power, see *Rogers v. Burlington*, 3 Wall. 654, 667; compare dissent on this point, *Ib.* p. 672; *Bissell v. Jeffersonville*, 24 How. 300; *supra*, sec. 9; *Cooley on Taxation*, 548, 549; *Butler v. Dunham*, 27 Ill. 477; *Steines v. Franklin County*, 48 Mo. 176, 185; *State v. Van Horne*, 7 Ohio St. 331; *Barrett v. County Court*, 44 Mo. 201; *Shoemaker v. Goshen Township*, 14 Ohio St. 587.

In *Supervisors v. Schenck*, 5 Wall. 781,—from Illinois—which is an important case on this subject, it appeared that in Illinois, counties were authorized, upon a popular vote, to subscribe for stock and pay therefor in bonds; an election was ordered by the *county court* in a certain county, when it should have been ordered (by reason of a change in the law) by the *board of supervisors*; it was duly held; the proposition was carried; the *supervisors* made the subscription, issued the bonds, received the stock and ordered the levy of taxes, and paid the coupons for nine or ten years; and it was held by the Supreme Court of the United States, in conformity with the doctrine of the State supreme court as first announced but subsequently overruled, that the acquiescence, conduct and acts of the county authorities were a ratification of the bonds, at least when in the hands of an innocent holder, and estopped the county to make the defence that the election had been ordered by the county court instead of the board of supervisors. In view of the facts as stated, the judgment

PART II. OF THE MODE OF ENFORCING PAYMENT OF MUNICIPAL SECURITIES.

SEC. 24. *Mode of enforcing payment—When right to a special tax exists, it cannot be impaired by subsequent legislation.*—The general principles of law concerning the mode of enforcing the claims of creditors, including bond creditors, of municipal corporations have been elsewhere treated of by the

of the court would appear to be sound and open to no criticism, as the objection to the bonds was an irregular exercise of an admitted power in the county, and not a want of power. The recital in the bonds is not given, but it would appear from the opinion that the plaintiff's case also fell within the doctrine of *Knox County v. Aspinwall*.

In *Pendleton County v. Amy*, 13 Wall. 297, 1871, decided on demurrer, it did not appear that there was any estoppel by reason of recitals in the bond, nor from subsequent payment of interest, but the pleadings showed that the county had received in exchange for the bonds a certificate of the stock of the railroad company, which it had held for seventeen years before the suit was brought, and still held. The county was authorized to purchase the stock, but only on condition of a popular vote. It was decided by the Supreme Court that purchasing and holding the stock under these circumstances estopped the county to assert against an innocent holder of the bonds that they were issued in disregard of the condition of a popular election, required by the act of the legislature conferring the power. Three of the judges dissented, probably on this point; and certainly the case seems to be an extreme application of the doctrine of estoppel. The bonds (so far as appeared) were without recitals; no payment of interest had been made; a popular vote was made necessary, and the plea alleged that no such vote had ever been had, and that the question of subscription had never been submitted to or voted upon by the people; and the mere receipt and holding of the stock were held sufficient to estop the county to make the defence. We have not been able to reconcile the case, on this point, with *Marsh v. Fulton County*, referred to in a subsequent portion of this note.

Payment of interest on bonds issued in violation of the constitutional rights of the citizen does not estop the municipality from defending against them. The court says:

"We do not attach any importance to the fact that the town authorities paid one installment of interest on these bonds. Such a payment works no estoppel. If the legislature was without power to authorize the issue of these bonds, and its statute attempting to confer such authority is void, the mere payment of interest, which was equally unauthorized,

present writer, and it is not designed here to repeat what may there be found.⁵⁴ We confine ourselves here to the rights and remedies of *bond* creditors. In ascertaining these, special reference must be had to the legislation under which the bonds were issued. If the legislature authorizes a debt to be created, and provides no special mode for its payment, it is probably a sound proposition that it was contemplated that it should be paid in the usual way in which such debts are paid, viz, by the levy and collection of a tax for that purpose.

In respect of railway aid bonds of municipal and public corporations, the settled rule of law is that the power to issue them must be expressly conferred, and in the legislative act conferring it, or in the general legislation of the state concerning the subject, express provision is usually made, authorizing or requiring the levy and collection of taxes, or of a special tax, to pay the debt thus created. Such provisions are of great consequence, and have often proved to be the

cannot create of itself a power to levy taxes, resting on no other foundation than the fact that they have once been illegally levied for that purpose." *Loan Association v. Topeka*, 20 Wall. 655, 667.

The case of *Marsh v. Fulton County*, 10 Wall. 676, 1870, decides this principle, viz, that where, under the legislation of the state, the county authorities had no power to subscribe for stock and issue bonds therefor, and where (as held) they made the subscription and issued the bonds without the sanction of a popular vote, *the bonds containing no recital*, such bonds are void, and are not ratified by acts of the county authorities, such as appointing agents to participate in the corporate meetings of the railway company, nor by the payment of part of the bonds and the interest on the others for a series of years, and the reason given by the court was that no ratification could be made unless it was authorized by the people—the defect being one of power. Field, J., observed: "They [the supervisors] could not, therefore, ratify a subscription without a vote of the county, because they could not make a subscription in the first instance without such authorization." Compare *Pendleton County v. Amy*, *supra*.

⁵⁴ Dillon on Munic. Corp. chap. xx, on *Mandamus*, sec. 685, *et seq.* Chap. v of Mr. High's very useful work on Extraordinary Legal Remedies contains a collection and brief statement of the more important cases relating to the writ of *mandamus* as applicable to Municipal Corporations, to which we take pleasure in referring the reader.

sole ultimate legal reliance of the creditor; and they are so far connected with the obligation of the contract as to come under the protection of the Federal constitution, and they cannot be repealed or impaired by subsequent legislation.⁵⁵

Where the statute makes express provision for the payment of bonds by the levy and collection of taxes for that purpose, the bond-holder has a right to stand upon this provision and to call for its enforcement in his favor; and in such cases it is no answer to his application for this purpose that an execution has not been returned *nulla bona*, or that the debtor corporation may have property subject to sale on execution.⁵⁶

SEC. 25. *Remedy of bond-holder is by mandamus, and not in equity.*—The proper mode of enforcing or compelling the performance of the duty of levying and collecting taxes, in such cases, is by *mandamus*, and not by a bill in equity. This was first decided by the Supreme Court in *Walkley v. Muscatine*,⁵⁷ and that tribunal subsequently,⁵⁸ under circumstances which made a strong appeal to its sense of justice, has re-affirmed the principle and refused to exercise *equity jurisdiction* over a repudiating municipality to compel it to pay a judgment, which the process of *mandamus* had proved, (by reason of successive resignations of the municipal officers, aided by the character of the legislation of the state,) for a period of fourteen years, ineffectual to enforce. The court re-asserted the doctrine that the regular and appropriate remedy of the creditor is the writ of *mandamus*; and declared that in legal contemplation, judged by its nature and ordinary results, and not by its failure in exceptional cases, it was an adequate remedy, and that the difficulty of its execution in

⁵⁵ *Van Hoffman v. Quincy*, 4 Wall. 535, is the leading case on this point, but there are numerous others in which the principle has been applied, which are cited and referred to in *Dillon on Munic. Corp.* secs. 41, 42.

⁵⁶ *Knox County v. Aspinwall*, 24 How. 376, 1869; *Benbow v. Iowa City*, 7 Wall. 313, 1868; *Dillon on Munic. Corp.* sec. 686 and notes.

⁵⁷ *Walkley v. Muscatine*, 6 Wall. 481, 1867.

⁵⁸ *Rees v. Watertown*, 19 Wall. 107, 1873; followed and re-affirmed in *Heine v. The Levee Commissioners*, 19 Wall. 655.

a particular instance afforded no sufficient ground for equitable jurisdiction.

SEC. 26. *Jurisdiction and course of procedure in the federal courts—Execution—Demand—Refusal.*—The remedy of the municipal or county bondholder in the federal courts is to sue at law and obtain a judgment to establish the validity and amount of his debt.⁵⁹ Thereupon it is usual to issue execution if the corporate debtor *can* by law have property subject to execution. On a return of the writ *nulla bona* or unsatisfied, application is made upon an information or relation, under oath, reciting these facts, for a *mandamus* to compel the levy and collection of a tax to pay the judgment. But if the bond-holder is by the statute entitled to a levy of a *special* tax to pay his judgment, and if the duty of levying it has been neglected or refused, it is not necessary that an execution should in such case be returned *nulla bona* in order to give the judgment-creditor the right to a *mandamus*. As the course of procedure in the federal courts is assimilated to that at *common law*, and is not regulated by state statutes, a *demand* of the respondent, and a *refusal* must be shown, or circumstances which will dispense with the

⁵⁹ *Heine v. The Levee Comm'rs*, 19 Wall. 655, 657, 1873; *Town of Queensbury v. Culver*, 19 Wall. 83, 92. In such cases the Federal courts have no power to issue a writ of *mandamus* as an *original* proceeding, and hence a bondholder cannot, (as it is held in some of the State courts he may do under certain circumstances,) *before* putting his claim into judgment, apply for a *mandamus*. In the Federal court he *must*, as stated in the text, first obtain his judgment. *County of Bath v. Amy*, 14 Wall. 244, 1871. Then, upon making the proper relation, he becomes entitled, under what was sec. 14 of the Judiciary act, (now Rev. Stats. sec. 716,) to a writ of *mandamus*, as the appropriate remedy to enforce his judgment. It is, when thus issued, the *final process* to enforce the judgment, and performs, in substance, against municipal corporate debtors the office of a writ of execution, with the operation of which the State courts can no more interfere than they can with the other process of the Federal courts. These are settled principles in the jurisprudence of the United States. The leading case is *Riggs v. Johnson County*, 6 Wall. 166, 1867, and its principles have been frequently re-asserted and applied. The reader will find the decisions cited, *Dillon on Munic. Corp.* sec. 693, note.

demand. When a demand is made, it should be upon the corporation or the particular officers whose duty it is, and who have the legal power to comply therewith, and the demand should be for the performance of the *exact duty* due to the creditor, as for example, to levy and collect the necessary tax. It is probable that an execution issued and a demand of the proper officers thereunder for payment, would, ordinarily, be treated as a demand to levy a tax, as it would then, it is supposed, become the duty of the officers to levy the proper tax. At all events, such an effect is in practice usually ascribed to an execution. The prudent and very cautious practitioner could accompany the writ of execution with a specific written demand to levy and collect the tax, and have it served at the same time with the writ of *mandamus*, and the service should be upon *the* officers upon whom the legal duty rests to do the act demanded.

SEC. 27. *Obstacles in way of collection—Resignation of officers—Power of federal court.*—In the enforcement of judgments on municipal bonds, the creditors have encountered obstacles arising or supposed to arise from two decisions of the Supreme Court.—The United States v. Boutwell,⁶⁰ and Rees v. City of Watertown.⁶¹ The case against Mr. Boutwell arose when he was Secretary of the Treasury, and was an application in the inferior court for a *mandamus* to compel him to pay a certain order. The writ was refused, and a writ of error taken to the Supreme Court, after which Mr. Boutwell resigned and his successor was appointed. The Supreme Court refused the application to substitute the successor, and one ground of the refusal was, that in the absence of a statute altering the common law rule, the writ of *mandamus* abates by the death, *resignation* or removal from office of the officer to whom it is directed. In the view of the court, the office of a writ of *mandamus* is to compel the performance of a personal duty resting on the respondent: "If he be an officer, and the duty an official one, still the writ is aimed exclusively against him as a person, and *he*

⁶⁰ United States v. Boutwell, 17 Wall. 604, 1873.

⁶¹ Rees v. Watertown, 19 Wall. 107, 1873.

only can be punished for disobedience; the writ does not reach the office and cannot be directed to it; it is the personal default of the defendant that warrants the impetration of the writ; it necessarily follows from this that on the death or retirement from office of the original defendant, the writ must abate in the absence of any statutory provision to the contrary."

The Supreme Court in the other case referred to⁶² decided, in effect, these propositions: 1. That in the enforcement of his judgment against the municipality, the plaintiff was confined to his remedy at *law* by *mandamus* or otherwise, no ground of equity jurisdiction being made out. 2. That the neglect and refusal of the municipal officers to levy the taxes, their disobedience of the writs of *mandamus* and their resignations to evade the duty of levying and collecting the taxes did not authorize the court to appoint officers of its own to levy and collect them, denying, on this point, *Welch v. Ste. Genevieve*, 1 Dillon C. C. R. 130, and distinguishing *Supervisors v. Rogers*, 7 Wall. 175, and *Lansing v. County Treasurer*, 1 Dillon C. C. R. 522. 3. That it was not competent for the court, in virtue of its general jurisdiction as a court of equity, (there being *no individual liability* on the part of the tax-payers or inhabitants of the municipality to pay the debts of the corporation,) itself to subject individual property within the corporation to pay the judgment—the exclusive remedy being by *mandamus* directed to the municipality or its proper officers, commanding *them* to levy and collect, under the powers vested in them in that behalf, the requisite taxes.⁶³

⁶² *Rees v. City of Watertown, supra.*

⁶³ A direct effect of this decision, in connection with the protracted and successful evasion of the City of Watertown, was to encourage municipalities and counties elsewhere to adopt the same mode of escaping payment, viz, by successive and repeated resignations. This was practised to a considerable extent in the state of Missouri by several counties that were burdened with a large indebtedness, but it was measurably checked by the action of the executive of the state, Governor Hardin, in refusing to accept the resignation of the county court judges when he had good reason to believe that the resignation was tendered for this purpose.

SEC. 28. *Distinction between bonds and warrants as to enforcement.*—What we have heretofore said has related to the enforcement of municipal bonds where there is an *express* authority given or duty enjoined to levy a tax or a special tax to pay them. We have adverted in a preceding section⁶⁴ to the distinction between negotiable municipal bonds issued under direct authority from the legislature, and ordinary municipal or county orders or warrants. The distinction be-

The case of the Supervisors v. Rogers, 7 Wall. 175, 1868. in which the United States Circuit Court, after the county officers had evaded the law and disobeyed the peremptory writ, directed the *mandamus* to the *marshal* of the United States for the District of Iowa, commanding *him* to levy and collect the taxes named in the writ, and which was sustained by the Supreme Court, is declared in the Watertown case to depend, in this respect, wholly upon a statute of the state of Iowa (Rev. of 1860, sec. 3770). That statute had no special reference to this class of cases, and was simply to the effect that the court, in cases of *mandamus*, "besides or instead of proceeding against the defendant by attachment, may direct that the *act* required to be done *may be done by the plaintiff or some other person appointed by the court.*" The practice of the Federal court in *mandamus* cases is as at common law, and this statute had never been adopted by rule; but it was held "competent to adopt it in the particular case," and that it authorized the court to appoint a third person or officer of its own to levy and collect the required taxes. Looking at this case in the light of the decision and reasoning in the Watertown case and in Heine v. The Levee Commissioners, 19 Wall. 655, and of the above suggestions, it would seem to rest upon a very narrow basis. If the court is without power to make such an appointment without the aid of the statute, it was certainly a very broad and liberal view of the language of that statute to hold, that the "act" contemplated by it included the act of levying and collecting taxes, giving acquittances therefor, and selling property to enforce the payment thereof, and making conveyances to complete the sales. See Heine v. The Levee Commissioners, 19 Wall. p. 661. The statement in the opinion of Nelson, J., that this statute "is but a modification of the law of England and of the New England states, which provide for the execution of a judgment recovered against a county, city or town, against the private property of any individual inhabitant, giving him the right to claim contribution from the rest of the people," can hardly be maintained in view of the decision in the Watertown case, and it seems obvious that the section of the Iowa statute referred to was intended for no such purpose.

⁶⁴ *Supra*, sec. 5.

tween the two classes of instruments often becomes important when it is sought to enforce payment by means of *mandamus*. The latter class of instruments not being commercial paper, being in the nature of vouchers to the ordinary creditor and put in the shape of warrants or orders for his convenience, are to be paid in the manner provided by the charter or legislation of the state. The provisions are variant in different charters and in different states. In some of the states these instruments are to be registered and paid in the order of their registration, and there is no provision for the levy of a special tax to pay them; and it is contemplated that as they are issued in payment of the ordinary expenses of the city, town or county, that they are to be paid out of the ordinary revenues or resources. It has recently become quite common for the non-resident holders of such instruments to sue thereon in the Federal courts, hoping to obtain thereby some of the advantages which have been accorded by those courts to the holders of negotiable securities.

Where these warrants or orders have been issued by corporate or *quasi* corporate organizations capable of being sued in the State courts, the Federal courts, so far as our observation has gone, have held that the non-resident owner thereof may also sue thereon in the Federal court, and by its judgment establish the validity and amount of his debt, and such judgment may become the basis of an application made in due form for a writ of *mandamus*, but the writ when so issued will only command the proper officers to discharge the legal duty they owe, under the charter or statute, to the warrant-holder.⁶⁵ The Federal courts cannot over-turn or interfere with the policy of the state in respect to the rights or remedies of this class of creditors. The leading case on this subject is *The Supervisors of Carroll County v. The United States*.⁶⁶ Counties in Iowa are authorized to issue for ordinary expenses orders or warrants payable to bearer, and are liable to be sued upon them. The statute limited the power of the county authorities "for ordinary county revenue" to the levy

⁶⁵ *Jordan v. Cass County*, 3 Dillon, C. C. R. 185, 1874.

⁶⁶ *Supervisors etc. v. United States*, 18 Wall. 71.

each year of "not more than four mills on the dollar." It made no provision (as the statute was construed by the supreme court of the state, whose construction was regarded by the Federal courts as binding on them) for the levy of a *special tax* to pay judgments obtained on such warrants. The judgment-creditor in the Federal court claimed that he was entitled to the levy of a *special tax* to pay his judgment. But the Supreme Court of the United States held otherwise, and decided that a return to an alternative writ of *mandamus* by the county authorities, that they had already levied a four-mill county tax for the current year (that being the *maximum* amount allowed by statute) was a sufficient return.⁶⁷

⁶⁷ *Supervisors etc. v. United States*, 18 Wall. 71. The text sufficiently states the principle established by this case. In respect of the local statute of Iowa, (sec. — of the Iowa Revision,) the court distinguished and explained the case of *Butz v. Muscatine*, 8 Wall. 575,—perhaps it ought to be said it overruled it on this particular point.

The circuit court of the United States for the Eastern District of Arkansas, April Term, 1876, in conformity with the doctrines of the text, upon a review of the legislation of that state touching the indebtedness of counties on *warrants*, and the provisions of the new constitution on the subject of county indebtedness, declared the following propositions:

1. That the county court, in case the county is indebted, owes a legal duty to the creditor or warrant-holder to exert the power of levying taxes to the *maximum* limit allowed by law, if necessary to pay the outstanding indebtedness of the county. The *maximum* rate can in no event be exceeded. Dillon on Munic. Corp. sec. 689, and cases there cited.

2. That a creditor who has obtained a judgment in this court against a county may, after proper demand on the county court to discharge its duty in this regard, and a neglect or refusal on the part of the court to comply with such demand, have a *mandamus* to compel the performance of such duty. There must be such a demand or averment of facts of such a nature as will dispense with the demand.

3. Under the new constitution, (Art. XIV, sec. 9,) as to indebtedness then existing, there is a duty, which creditors may enforce, resting on the county court to levy a tax not exceeding one-half of one per cent. Such tax when levied and collected cannot "be used for any other purpose" than the payment of such indebtedness, (Art. XVI, sec. 11,) and must, according to our present impression, although the court does not hold itself concluded on the point, be collected in money, and not in other warrants.

A judgment-creditor of a county in Missouri whose judgment is based

upon municipal bonds secured by the right to a special tax, who has received under a *mandamus* a county warrant therefor, which is refused payment, may have another *mandamus* to enforce the judgment, and is not bound to take his turn among ordinary county warrant-holders. This ruling coincides with the distinction pointed out in the text. *United States v. Vernon County*, (Western District of Missouri,) 2 Cent. Law Jour. 771.

JOHN F. DILLON.

DAVENPORT, IOWA, September, 1876.



II. THE DARTMOUTH COLLEGE CAUSES AND THE SUPREME COURT OF THE UNITED STATES.

(No. 3.)

The opinion of Judge Marshall and the concurrence of his four associates "in the result" are to be weighed in the light of their antecedents, the history of the times and the atmosphere in which they moved, as well as of the reasoning on which the judgment apparently is founded.

Judge Livingston was a member of the famous New York family of that name. He was about sixty-two years old when this case was decided, and died some four years later. He graduated from Princeton; served upon the staff of Generals Schuyler and Arnold in the Revolution; and was admitted to the bar in 1783. For five years after his appointment in January, 1802, he occupied a seat between Kent and Thompson upon the Supreme Bench of New York. His opinions appear in the first and a small part of the second volume of Johnson's Reports. They exhibit his peculiar characteristics. It was hardly necessary for Kent to tell us of Livingston's disrelish for English authorities, though he often examined them with great care to see if they agreed with him. His hobby was commercial law, to which fact, and the peculiar relations which the Livingston family had held with the political parties of New York, he was mainly indebted for his appointment by Jefferson. He was an accomplished scholar, an excellent advocate and an able judge. His peculiar organization gave him great independence. Kent had great influence with him. The shrewd old Chancellor, in his letter of October 6, 1828, (*Southern Law Review*, July, 1872,) says: "In February, 1798, I was offered by Governor Jay, and accepted, the office of youngest judge

of the Supreme Court. This was the summit of my ambition." * * * "I never dreamed of volumes of reports, and written opinions; such things were not then thought of." * * * "When I came to the bench there were no reports or state precedents. The opinions from the bench were delivered *ore tenus*. We had no law of our own, and nobody knew what it was." * * * "Many of the cases decided during the sixteen years I was in the Supreme Court were labored by me most unmercifully, but it was necessary under the circumstances to subdue opposition. We had but few American precedents; our judges were democratic, and my brother Spencer, particularly, of a bold, vigorous, dogmatic mind, and overbearing manner. English authorities did not stand very high in these feverish times, and this led me a hundred times to attempt to bear down opposition, or shame it by exhausting research and overwhelming authority." * * * "I make much use of the *corpus juris*, and as the judges (Livingston excepted) knew nothing of French or civil law, I had an immense advantage over them. I could generally put my bretheren to rout and carry my point by my mysterious wand of French and civil law. The judges were republicans, and very kindly disposed to everything that was French, and this enabled me, without exciting any alarm or jealousy, to make free use of such authorities, and thereby enrich our 'commercial law.' I gradually acquired proper directing influence with my brethren, and the volumes in Johnson, after I became judge in 1804, show it."

Livingston took his seat on the bench of the Federal Supreme Court at the February term, 1807. Story came to that bench in 1812. From that time till Livingston's death, Story had greater influence over him, if possible, than ever Kent had. He published no opinion in *Sturges v. Crowninshield*, and we are not aware that one exists in an accessible form. It seems that he never drew up a formal opinion in the college case. His reasons for not doing so appear in his letter, and that of Judge Prescott, to Story, hereafter quoted. Story was very ambitious, and naturally desired to act as the organ of the court and to deliver its opinion in a case of so much import-

ance; and Livingston as naturally desired that his friend should have that opportunity. In this, as in other important cases, Story had the good sense and tact to submit his opinion for examination and criticism to those upon whose heads and hearts he could rely, before it was considered by his brethren.

Judge Prescott, in his letter of January 9, 1819, to Story, says: "I have read your opinion with care and great pleasure." * * * "I see nothing I should wish altered in it. I hope it will be *adopted without diminution or subtraction.*" Livingston, in his letter to Judge Story of January 24, 1819, says: "I return your opinion in the case of Dartmouth College, which has afforded me more pleasure than can easily be expressed. It was exactly what I had expected from you, *and hope it will be adopted without alteration.* What you say of the contract of marriage is a complete answer to the difficulty made on that subject, and I am not sorry that you have taken notice of the act of the legislature dissolving this contract, which has been passed in this state. As to the effect of the separation of the two countries on the charter of this college, in addition to what you say, it appears to me that its existence is admitted by the very acts which are complained of."¹ The passages we have italicised can hardly be misunderstood. A comparison of Livingston's letter with Story's opinion, as published by Farrar, shows that it was afterwards modified. How radical these changes were we shall probably never know.

The true construction of the obligation clause was a vital point in *Sturges v. Crowninshield*. This, though it tested the constitutionality of the New York bankrupt law, was a Massachusetts case. It arose in Judge Story's circuit, and was taken from the brief term of the circuit court which commenced October 15, 1817, to the Supreme Court, upon the formal certificate that the judges of the circuit court were opposed in opinion upon the following questions:

"1. Whether, since the adoption of the constitution of the United States, any state has authority to pass a bankrupt

¹ Life of Story, by his Son, 323, 324.

law, or whether the power is exclusively vested in the Congress of the United States.

"2. Whether the act of New York, passed the third day of April, 1811, and stated in the plea in this case, is a bankrupt act, within the meaning of the constitution of the United States.

"3. Whether the act aforesaid is an act or law impairing the obligation of contracts within the meaning of the constitution of the United States.

"4. Whether the plea is a good and sufficient bar of the plaintiff's action."

Trustees v. Woodward was, in form, taken to the Supreme Court from the November term, 1817, of the Superior Court of New Hampshire; but, in fact, not until December 21, 1817, in consequence of the difficulty the counsel for the respective parties found in agreeing upon a special verdict. Judge Smith drew one; Mr. Bartlett another. No advantage could be gained for the plaintiffs over the acute, quick-sighted and tenacious Bartlett. It was finally drawn up by Judge Farrar, but really under the eye of Smith and Mason, and, in this form, was assented to, by the genial, kindly, easy and less alert Sullivan.

Mason, in his letter to Judge Smith, of December 1, 1817, says: "I have received a letter from Mr. Webster, in which he expresses a desire to have the record and writ of error in the college cause as soon as possible, to send it on and have it entered early in the docket. All that I can do in furtherance of this object is to communicate his desire to you."

In his letter of December 11, 1817, to the same, Mason says: "I received your letter, and have seen Mr. Bartlett and *his verdict*. He objects to almost all yours, and we can certainly agree to little of his. He says, however, he has written to Mr. Sullivan that he drew his to match yours, and that Mr. Sullivan will not suppose that he (Mr. B.) thinks all his departures from you material, and that S. and you will probably agree. I hope you may, for I think there will [be] great trouble in any attempt to agree with B. Judge Richardson has seen both. What he thinks of them I know not. It is

important they be soon completed. The bearer has both verdicts, I suppose, to deliver to Mr. Sullivan."

In his letter of December 12, 1817, Mason says to Judge Smith: "Your man came yesterday for the college verdicts while I was reading them for the first time. I had no time to think of them. After he was gone it occurred to me that there might be a difficulty in your verdict as to the conversion. If I rightly recollect, it does not state an actual conversion, but a demand and refusal." * * * "Perhaps it is of no importance in our case as the Supreme Court can reverse on one point only. And for this reason, perhaps, it would be best to have that point only presented to the court in the conclusion of the verdict, rather than the general conclusion which you contemplated. I am afraid there will be a difficulty in settling the verdict. Do everything with Mr. Sullivan if you can."

In his letter of December 22, 1817, to Smith, Mason says: "Judge Richardson got home last evening very sick, but has signed the citation and allowed writ of error without difficulty. Bartlett declined reading the special verdict; said he supposed it right, and should make no objection. I presume Sullivan will sign the agreement, etc."

Sturges v. Crowninshield was transferred and reported previous to the college case; but both were before the court and under consideration substantially the same length of time. Both were important cases and involved the construction of the same provision of the constitution. To be thoroughly understood, this case must be read and compared with the individual opinions of the judges in *Ogden v. Saunders*, *Robbins v. Shaw*, *Mason v. Haile*, 12 Wheat. 214-383, and subsequent cases. But six judges sat in *Sturges v. Crowninshield*. Upon the general question, as suggested by Mr. Webster, they were well known to be equally divided. Livingston sustained the constitutionality of these laws, in whose atmosphere he had been reared, and we are not aware of any evidence that he ever concurred either in the adroitly framed judgment in that case, or the reasoning by which such a result was reached. As we shall hereafter see neither

Washington nor Johnson ever concurred in the reasoning of Judge Marshall in important particulars. The judgment which Webster saw was coming was the result, not of accord, but of discord wrought into a compromise by the diplomatic skill and tact of Marshall, and his ascendancy over the wills of men, even when he could not shake their convictions.

Judge Johnson was a South Carolinian of English stock. He was born in 1771; graduated at Princeton with the highest honors when nineteen; read law under the eye of C. C. Pinkney; was admitted to the bar when twenty-two, and very soon attained eminence in his profession. When twenty-three he became a member of the legislature; was twice re-elected; and was speaker during his last term. But as his tastes were judicial rather than political, he retired from political life, and under the reorganization of the judiciary system became one of the judges of the circuit court.

On March 26, 1804, he was appointed by Jefferson to the bench of the Supreme Court. At the time of the decision in the college case he was forty-eight years old. In 1822, he published the "Life etc. of Nathaniel Greene." A portion of this work was devoted to the "history of parties." He proposed to continue the latter, and to trace how far, if at all, the Supreme Court had, by construction, "advanced beyond its constitutional limits and trespassed on those of the state authorities;" and corresponded confidentially with Jefferson upon the subject, as their letters of April 11, 1823, and June 12, 1823, respectively show. A series of his letters to the *Charleston Courier* show that he made some progress in this work, but we are not aware that it was ever completed, or that, except in this form, any part of it was given to the world.

Judge Story in his letter to Fay of Feb. 25, 1808, (1 Life of Story, 168,) describing the judges, says: "I ought not to pass by Judge Johnson, though I scarcely know how to exhibit him individually. He has a strong mathematical head, and considerable soundness of erudition. He reminds me of Mr. Lincoln [Jefferson's attorney-general when *Marbury v. Madison* arose and was decided, and the nominal successor

of Judge Cushing,] and in the character of his mind he seems to me not dissimilar. He has, however, less of metaphysics and more of logic." The opinion of Story in later years was less flattering. Story, soon after his accession to the bench, though politically he seems to have regarded himself as the immutable point in the universe, from a radical Republican, in the sense in which that term was used in olden time, changed to a Federal Imperialist of the Jay school, leaving Marshall far behind; and afterwards was not inclined to look with special favor upon those whose opinions were less advanced than his own. Johnson did not grow in favor with him. He termed Johnson's views upon certain constitutional questions "peculiar," and, in some respects, they were. Johnson's tastes were quiet, unpretentious and scholarly. His learning was rare, curious and diversified; but though his was an important circuit, we know little of his judicial life beyond what is disclosed by his opinions in the Supreme Court, and they vary much. Some of them are strong and able, others are wanting in exactness and precision, and indicate that the writer was confused and unable to put his opinion on grounds satisfactory to himself. His legal instincts seemed to far outrun his power to make others see by written words what he felt. He had little in common with the southern politicians of his day, with whom he nominally affiliated. He was not only the staunchest of union men in the days of nullification, but always had a strong national-Federal bias; in a word, though not an Imperialist like Story, he was a Centralist from conviction.

Before Marshall's appointment, the Supreme Court followed the English practice, under which each judge who sat in a cause gave an opinion whenever he thought there was occasion for it; but in general those judges who presided at the circuit declined to sit *in banc*, except in a case of equal division. Under Marshall, (who argued but a single cause in that court before he became chief justice,) this practice was rooted out so far as his influence extended; the judges reheard the causes which they had decided at the circuit; the practice of giving individual opinions was repressed; the

practice became general of making one judge "the organ of the court," of virtually assigning causes, and of taking them home for the purpose of writing up opinions in vacation; and of having an opinion read by a single judge as the opinion of the court, when the judgment received the assent of but three, and sometimes two, of the judges, and the reasoning of a less number. This vicious practice occasioned great dissatisfaction.

The primitive court consisted of five judges. It was increased to six, and afterwards to seven; for years it was necessary for two of these judges in general to ride the circuit together; not unfrequently, after the accession of Marshall, but four judges held the general term at Washington, and constituted the court when many important causes were decided; two of the judges were aged and infirm, and one of them for years before his death was so superannuated that he practically left his circuit, a most important one, to take care of itself, and was a nonentity at Washington; the new chief had, from his acknowledged ability and force, and weight of character, and from his tact and diplomatic skill, great influence with his brethren; for years he prepared a large share of the opinions; when an occasion required, he was an adept in "patching up" compromise judgments and opinions; confident that he was right, he sometimes entered up judgment and read opinions, as the opinion of the court, without being as careful as a discreet judge ought, to find out whether his opinion was that of a majority or minority of the court. In *Rose v. Himely*, 4 Cranch, 41, he delivered the leading opinion and ordered the judgment of the circuit court to be reversed, etc., when in fact but a single judge agreed with him, as afterwards appeared in *Hudson v. Guestier*, 6 Cranch, 281. In one of the cloud of opinions delivered by Marshall at the trial of Aaron Burr, he admits that he made a mistake of a similar character in *Bollman's* case. In this way two judges sometimes practically became a majority of six, and three a majority of seven. The cases referred to were by no means the only instances of a similar kind, nor could they fairly be attributed to the press of business.

These facts were open secrets in narrow circles. This intensified the dissatisfaction. A judiciary bill was reported to Congress by the attorney-general, which *required* the judges to deliver their opinions *seriatim* in open court, and then to give them in writing to the clerk to be entered upon his record. This feeling lay at the bottom of the attempts in Congress (which gave Webster so much trouble, and some of the judges so much uneasiness) to prohibit the judges from setting aside a state law as unconstitutional, unless a certain number of judges sat in the cause and concurred in the judgment. It was one of the causes of Jefferson's dislike of Marshall which made him say, with a bitterness unusual to him, in his letter to Ritchie of June 25, 1820: "An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his mind by the turn of his own reasoning."

In such a judicial atmosphere, Johnson, keen, critical, sagacious, able, and honest, as he was, sometimes silently acquiesced in opinions and judgments contrary to his convictions; and at others set the example commended by Jefferson in his letter of June 12, 1823: "I rejoice in the example you set of *seriatim* opinions. I have heard it often noticed, and always with high approbation. Some of your brethren will be encouraged to follow it occasionally, and in time it may be felt by all as a duty, and the sound practice of the primitive court be again restored. Why should not every judge be asked his opinion, and give it from the bench, if only by yea or nay? Besides ascertaining the fact of his opinion, which the public have a right to know, in order to judge whether it is impeachable or not, it would show whether the opinions were unanimous or not, and thus settle more exactly the weight of their authority."

The true construction of the obligation clause must be determined upon principle at last. In what sense did the people use these words when they adopted this provision? When we know this we know all. History, reasoning and canons are only pertinent as they bear upon this question.

They are intimately connected, but the words "obligation" and "contract" are no more synonymous than light and darkness. The constitution does not prohibit legislative interference with contracts; it protects the *obligation*; but the contract is protected only so far as that results incidentally from the prohibition against impairing the obligation. That the obligation of all executory contracts, except those which undertake to barter away sovereignty, whether express, tacit, or otherwise inferred, or those which the law erects, as in case of absolute idiots, etc., is protected, is clear. Beyond lies the disputed territory. Marshall, in his second opinion in *Fletcher v. Peck*, 6 Cranch, 127, assumed that executed contracts carried with them by implication an obligation which the constitution protected after the execution—in other words, that in this way the naked sale is protected. This is the foundation of the error. In that case but five of the seven judges sat, and Johnson delivered a dissenting opinion.

The legislature of Georgia, in 1795, claiming that the United States had no title to certain western tribal lands; that they were within the boundaries of Georgia; that Georgia held the title, subject to the unextinguished Indian title, authorized the governor, by an act for that purpose, to convey the same to James Gunn and others. The governor made the conveyance in due form for a valuable consideration. A portion of these lands was conveyed by the original grantees to James Greenleaf, and from him through a chain of conveyances to the defendant, Peck. All the conveyances after that to the original grantees were made for valuable considerations, without knowledge or notice on the part of any of these vendees, that the original grantees secured the passage of this act, as was alleged, by bribery, etc. A subsequent legislature, alleging this corruption, passed another act rescinding the former one, annulling the deed to the original grantees, and asserting the title of the state to the lands it covered. Peck conveyed with covenants to Fletcher. After the act Fletcher brought suit for covenant broken. This, like *Sturges v. Crowninshield*, was a Massachusetts case. In the one the legislation of Georgia, and in the other

that of New York, was held invalid. Whether *Fletcher v. Peck* was at the bottom a genuine case, or one in which important questions were mooted for the purpose of furthering in another field the interests of speculators, may be questioned, however legitimate it may have been so far as the counsel and some of the immediate actors were concerned. This cause was argued the last time, by Martin for the plaintiff, and Robert Goodloe Harper and Joseph Story, for the defendant. Few things could be more absurd than to imagine these great lawyers gravely arguing before such a court whether the solemn enactment of a great state could be set aside by the finding of a quarter-sessions judge or petit jury, that its passage was procured by "undue influence," or purchase.

Judge Johnson, in the conclusion of his opinion, says: "I have been very unwilling to proceed to the decision of this cause at all. It appears to me to bear strong evidence upon the face of it of being a mere feigned case. It is our duty to decide on the rights but not in the speculations of parties."

Judge Marshall discussed the points raised by the first count last, and seems to have held:

1. That a state, unless restrained by its constitution, may sell its lands.

2. There was no such prohibition in the constitution of Georgia.

3. That the question as to the title of the United States had been settled by compact.

4. That the reservation, "for the use of the Indians," etc., "was a temporary arrangement," and did not prohibit the state from acquiring or selling these lands.

5. That somehow the Indian title either could or would not be legally invaded.

6. That a recovery might be had notwithstanding the peculiar language of the covenants and the state of the Indian title.

7. That as between the state and innocent purchasers, the court would not enter into an investigation of the question, as to whether the original grantees obtained their title by corrupting the legislature or not.

The fourth covenant was that the title to the premises had been in no way constitutionally or legally impaired by any subsequent act of any subsequent legislature of Georgia.

The third count based upon this covenant set forth the corruption of the legislature, the annulling act at length, and averred that by reason of this act the title of Peck was constitutionally and legally impaired. The defendant again pleaded that the first purchaser under the original grantees, and all subsequent holders of the property, including himself, were purchasers without notice. There was a demurrer and joinder. Eight pages of Marshall's opinion are devoted to the discussion of the questions thus raised.

Fletcher v. Peck has been commonly treated as if he put the judgment distinctly upon *the* ground that the annulling act impaired the obligation of contracts. Few things could be farther from the truth. In summing up, he puts the judgment distinctly upon the ground "that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration without notice, the state of Georgia was restrained, either by *general principles* which are common to our free institutions, *or by the particular provisions* of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void." The italics are ours.

This is but little, if anything, more than was said by the same judge when "delivering the opinion of the court," in Insurance Co. v. Canter, 1 Peters, 511. In that case, after discussing whether the power to govern was derived from the right to acquire territory, or from a specific clause in the constitution, he put the judgment upon the ground that, "whichever may be the source whence the power is derived, the possession of it is unquestioned." In subsequent decisions by the same court, this power has been placed first on one of those grounds and then on the other. The first proposition stated by Marshall as the foundation of the judgment in Fletcher v. Peck was the one, as we have seen, supported by Mason and Smith before the state court,

and by Mr. Webster in the Supreme Court, in the college case. That this was the favorite doctrine of Story, as well as Webster, is not only well known as a fact, but is shown by Story's letter to Mason above quoted, and in his subsequent opinions in *Terrett v. Taylor*, 9 Cranch, 50, and *Society v. Pawlet*, 4 Peters, 480. If this position was sound, the discussion of the obligation clause and other provisions of the Federal constitution was unnecessary, Johnson having spoken for himself. The second reason assigned for the judgment is, not that the annulling act was prohibited by a particular provision, *i. e.*, the obligation clause, but by "particular provisions" of the constitution. Those "provisions" are sufficiently indicated in the opinion. The argument is that the rescinding act was void because—

1. It was virtually a bill of attainder.
2. It was in effect an *ex post facto* law.
3. It impaired the obligation of contracts.

Marshall quotes and endorses Blackstone's definition of contracts. 2 Black. Com. ch. 30, *440,* 443. This chapter is entitled, "Title by gift, grant and contract." He says: "Gifts, then, or *grants*, which are the eighth method of transferring personal property, are thus to be distinguished from each other: that *gifts* are always *gratuitous*; *grants* are upon some consideration or equivalent; and they may be divided, with regard to their subject-matter, into gifts or grants of chattels *real* and gifts or grants of chattels *personal*." * * *

"Grants or gifts of chattels *personal* are the act of transferring the right and the possession of them; whereby one man renounces and another immediately acquires all title and interest therein; which may be done either in writing or by word of mouth, attested by sufficient evidence, of which the delivery of possession is the strongest and most essential."

* * * "A contract may also be either *executed*, as if A agrees to change horses with B, and they do it immediately; in which case the possession and the right are transferred together; or it may be *executory*, as if they agree to change next week; here the right only vests, and their reciprocal property in each other's horse is not in possession, but in

action; for a contract *executed* (which differs nothing from a grant) conveys *a chose in possession*; a contract *executory* conveys only *a chose in action*." That the learned author did not refer to the effect of legislative enactments or the alienation of sovereignty is too obvious for comment. Judge Marshall says: "The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant in its own nature amounts to an extinguishment of the right of the grantor, and implies a contract not to re-assert that right. A party is, therefore, always estopped by his own grant." Precisely what is meant by this is not clear. I own a cargo of flour. About my title, there is no dispute. My neighbor, knowing all about it, buys it, pays for it and takes it away. What obligation do I owe him; what obligation is binding on me? I own lands—convey them without covenants. The purchaser pays me and enters into possession. What obligation binds me? If a legal estoppel is meant, it would seem obvious that a naked grant carries no obligation with it. The contract has been executed; it has done its work. It is true that parties may couple executory agreements with the subject of an executed contract, but that is simply saying that parties may make executory contracts, if they choose, and that the obligation of those contracts is protected,

Judge Johnson filed a dissenting opinion in this case. His legal instincts led him, it seems to us, to the correct conclusion. He says: "The right of jurisdiction is essentially connected to, or rather identified with, the national sovereignty. To part with it is to commit a species of political suicide. In fact, a power to produce its own annihilation is an absurdity in terms. It is a power as utterly incommunicable to a political as to a natural person. But it is not so with the interests or property of a nation. Its possessions nationally are in nowise necessary to its political existence; they are entirely accidental, and may be parted with in every respect similarly to those of the individuals who compose the community." * * * "I have thrown out these ideas that

I may have it distinctly understood that my opinion on this point is not founded on the provision in the constitution of the United States relative to laws impairing the obligation of contracts. It is much to be regretted that words of less equivocal signification had not been adopted in that article of the constitution. There is reason to believe from the letters of Publius, which are well known to be entitled to the highest respect, that the object of the convention was to afford a general protection to individual rights against the acts of the state legislatures." * * * It is obvious from the context, that in his reference to Publius, Johnson refers, not to No. 7 of 'The Federalist,' written by Hamilton, but to No. 44, written by Madison. "Now a grant or conveyance," he continues, "by no means necessarily *implies the continuance of an obligation beyond the moment of executing it*. It is most generally but the consummation of a contract, is *functus officio* the moment it is executed and *continues afterwards to be nothing more than the evidence that a certain act was done*." The latter statement seems to us to contain a great and incontrovertible legal truth. It was, in effect, what was before said by Judge Wilson, and what was afterwards repeated by Judge McLean. However much we might desire to change the grounds on which it has been assumed to rest, no honest man could wish to disturb the judgment in this case. Taking the case as stated in the record, it was an attempt at downright robbery. Our convictions are that the judgment was sustainable upon other grounds than those stated.

Judge Johnson gave no opinion in the college case or in *Sturges v. Crowninshield*. In *Green v. Biddle*, 8 Wheat. 1, 97, he refused to discuss the obligation clause; but in *Ogden v. Saunders* he states what his opinion was in *Sturges v. Crowninshield*. He says: "The report of the case of *Sturges v. Crowninshield* needs also some explanation. The court was, in that case, *greatly divided* in their views of the doctrine, and the judgment partakes as much of a compromise as of a legal adjudication. The minority thought it better to yield something than risk the whole. And, although their course of reasoning led them to the general maintenance of the state

power over the subject, controlled and limited alone by the oath administered to all their public functionaries to maintain the constitution of the United States, yet, as denying the power to act upon anterior contracts could do no harm, but, in fact, imposed a restriction conceived in the true spirit of the constitution, *they were satisfied to acquiesce in it, provided the decision were so guarded as to secure the power over posterior contracts as well from the positive terms of the adjudication as from inferences deducible from the reasoning of the court.* The case of *Sturges v. Crowninshield*, then, must, in its authority, be limited to the terms of the certificate, and that certificate affirms two propositions:

1. That a state has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts within the meaning of the constitution, and provided there be no act of Congress in force to establish an uniform system of bankruptcy, conflicting with such law.

2. That a law of this description, acting upon prior contracts, is a law impairing the obligation of contracts within the meaning of the constitution.

Whatever inferences or whatever doctrines the opinion of the court in that case may seem to support, the concluding words of that opinion were intended to control and to confine the authority of the adjudication to the limits of the certificate.

“The first of these questions [whether a state bankrupt law, operating upon subsequent contracts is prohibited by the obligation clause] has been so often examined and considered, in this and other courts of the United States, and so little progress has yet been made in fixing the precise meaning of the words ‘obligation of a contract,’ that I should turn in despair from the enquiry, were I not convinced that the difficulties the question presents are mostly factitious, and the result of refinement and technicality; or of attempts at definition, made in terms defective, both in precision and comprehensiveness. Right or wrong, I come to my conclusion on their meaning, as applied to executory contracts, the subject now before us, by a simple and short-handed exposition. Right and obligation are considered by all ethical

writers as correlative terms. Whatever I, by my contract, give another a right to require of me, I, by that act, lay myself under an obligation to yield or bestow. The obligation of every contract will then consist of that right or power over my will or actions, which I, by my contract, confer on another. And that right and power will be found to be measured neither by moral law alone, nor universal law alone, nor by the laws of society alone, but by a combination of the three ; an operation in which the moral law is explained and applied by the law of nature, and both modified and adapted to the exigencies of society by positive law." * * * *

"They [the parties] can enter into no contract which the laws of that community forbid, and the validity and effect of their contracts is what the existing laws give to them." * * *

"If it be objected to these views of the subject, that they are as applicable to contracts prior to the law as to those posterior to it, and, therefore, inconsistent with the decision in the case of *Sturges v. Crowninshield*, my reply is, that I think this no objection to its correctness. I entertained this opinion then, and have seen no reason to doubt it since. But, if applicable to the case of prior debts, *multo fortiori*, will it be so to those contracted subsequent to such a law ; the posterior date of the contract removes all doubt of its being in the fair and unexceptionable administration of justice that the discharge is awarded." We regard these extracts from Johnson's opinion, a portion of which we have put in italics, as very important. The opinions of Marshall in the college case, and in *Sturges v. Crowninshield*, so far as they pertain to the construction of this clause, are virtually a single opinion. The extracts we have just quoted do not undertake to give a full history of the position of individual judges or of the report in the latter case ; but, as far as it goes, we assume that it states the facts correctly. When the decision in *Ogden v. Saunders* was made, Livingston had given place to Thompson. But five of the judges, including Marshall and Story, were the ones who decided *Sturges v. Crowninshield*. The dissenting opinion of Marshall in *Ogden v. Saunders*, if not his masterpiece, was one of the ablest efforts of his life. If

Johnson had stated this history of his own views and the report incorrectly, neither Story nor Marshall could, or would, have permitted it to pass unnoticed. The simple truth is, that the dissenting opinion in *Ogden v. Saunders*, in its general reasoning, is identical with that in those cases, but the majority of the court, in this case, shrank from the logical consequences of that reasoning, as they did in *Charles River Bridge v. Warren Bridge*, 11 Peters, 420. By releasing all posterior contracts from the protection of the obligation clause, this decision changed, as Judge Marshall said, "the character of the provision, and converted an inhibition to pass laws impairing the obligation of contracts into an inhibition to pass retrospective laws." Had the fathers first adopted a clause prohibiting all retrospective laws, it is impossible to believe that they would have added to it the inferior prohibition of the obligation clause.

Judge Washington died November 26, 1829, some ten years after the decision in the college case. Judge Story says he was born June 5, 1762, but others say at an earlier period. He was the nephew of General Washington; read law in Philadelphia after the close of the war; was admitted to the bar in his native county, in Virginia, and afterwards resided at Richmond and Alexandria. In 1787 he was a member of the lower branch of the Virginia legislature, and in 1788 sat with Marshall in the convention which ratified the Federal constitution. At the bar, he was often pitted against Marshall, Campbell and other prominent lawyers. He reported the decisions of the court of appeals from 1792 to 1796. In these two volumes, he briefly reported his own arguments and those of Marshall, etc. On September 29, 1798, John Adams, after hesitating for some time as to whether Washington or Marshall should receive the appointment, nominated him to fill the vacancy on the Supreme Bench created by the death of Judge Wilson. The nomination was confirmed December 20, 1798, and he held the office till his death.

In his letter to Fay of 1808, from which we have already quoted, Judge Story says: "Washington is of a very short

stature, and quite boyish in his appearance. Nothing about him indicates greatness. He converses with simplicity and frankness. But he is highly esteemed as a profound lawyer, and I believe not without reason. His written opinions are composed with ability, and on the bench he exhibits great promptitude and firmness in decision. It requires intimacy to value him as he deserves."

Professor Goodrich (1 Life of Webster, 171,) thus describes him in the scene which transpired during the delivery of Webster's peroration in the college case, in 1818: "Mr. Chief Justice Marshall, with his tall, gaunt figure, bent over as if to catch the slightest whisper, the deep furrows of his cheeks expanded with emotion, and his eyes suffused with tears; Mr. Justice Washington at his side, with his small and emaciated frame, and countenance more like marble than I ever saw on any other human being, leaning forward with an eager, troubled look." His appearance was not deceptive. He was in no sense a great man or judge, but in every sense a good one. He was not an original thinker, nor a man of genius. He was neither quick, brilliant nor profound, but he had fair abilities; his mental powers were evenly developed, harmonious, and worked in unison; he was conscious, for he expressed it in his opinions, that he was unable to convey to the minds of others the full force of his convictions, and his reasons for them; he was sometimes oppressed with Eldon's doubts, without Eldon's infirmity of procrastination; seldom able to satisfy himself, patience and painstaking became with him a religious duty, though after Story came to the bench, he relied to a great extent for authorities on the abstracts and cases furnished by him, as did others. The fear of men and of consequences he never felt; the approbation of a "faithful few" was dear to his heart, but the praise of others fell on non-receptive ears. He had an inborn and unconquerable aversion to every form of display; in everything he was slow, steady and reliable. As a jurist, he was conservative, and in general, submissive to precedent. He was an old school Federalist, firm and decided, but tolerant of those whom he thought sincere in their support of anti-Federalist

heresies. He was the specially intimate and devoted friend of Marshall, and shared his notions relating to the "dignity of the court," and individual opinions; and in learning he far exceeded him.

John Adams, though possessing unfortunate peculiarities of temper, was a great lawyer, and far surpassed in original genius all his gifted descendants. When he came to consider the appointment in 1798, he fixed upon Marshall or Washington as the successor of Judge Wilson, saying, "Marshall is first in rank, age and public services, and probably not second in talents." * * * * "If Marshall should decline, I should think next of Washington." Jefferson, in his letter to Dr. Rush, of September 23, 1800, suggested as an illustration of the true "mode of recording merit," that "in giving, for instance, a commission of chief justice to Bushrod Washington, it should be in consideration of his integrity and science in the laws," etc. Washington was one of the judges who concurred in the judgment in *Fletcher v. Peck*, though upon what precise ground, his opinions in the college case and *Satterlee v. Matthewson*, 2 Peters, 413-415, render uncertain. He was the only one of the seven judges who sat in the college case that is known, "upon the whole," to have "concurred in the result," at which Marshall had arrived, at the consultation, after the case was argued in 1818.

His opinion, which we have seen was never delivered, occupies about ten and one-half pages in Farrar, about one-sixth the space taken by Marshall and Story. It differs materially from the others. To this, and its author's deep sense of duty, we are undoubtedly indebted for its publication, while we owe its brevity to the fact that he was never given to writing essays on government or etiquette, like Marshall, nor lectures or treatises on legal topics, like Story. On the first page of his opinion, he disposes summarily of the elaborate arguments of Mason and Smith before the state court, and three-fourths of that of Webster before the Supreme Court, saying, "Whether the first objection to these laws be well founded or not is a question with which this court, in this case, has nothing to do." He seeks to show in the next

two and one-half pages, that the charter was a contract. His argument is, that Mr. Powell's definition is broad enough to cover executed contracts; that *Fletcher v. Peck* had decided "that a grant is a contract," and that the clause applies alike to executory and executed contracts; that under Blackstone's definition of a franchise, the creation of this corporation by charter was such a contract, and extinguished the king's prerogative to bestow the same identical franchise on another corporate body, because it would prejudice his prior grant. He then says, "It implies, therefore, a contract not to re-assert the right to grant the franchise to another, or to impair it." This is the identical proposition afterwards relied upon by Story, but overturned by a majority of the court in the great Bridge case. Its meaning is sufficiently obvious, but it seems never to have occurred to Washington that this reasoning fell far short of what was necessary. He was discussing a principle of English law in the light thrown upon it by a British author. Assuming that the king, whenever he granted a franchise, despoiled himself of the power to re-grant it, or to impair its value by a new creation under a fresh patent, he could neither expressly, nor by implication, annihilate the conceded power of Parliament to do as it pleased. Parliament had granted, and in many instances had altered and amended, charters. The king had no power to tie their hands except by veto. Even those who believe, that under a constitutional form of government the attributes of sovereignty are mere articles of merchandise, to be bartered away at pleasure, and that legislative bodies are "markets-overt" for that purpose, will hardly claim that the executive department can extinguish the veto power, present and future, by contract. If it were otherwise, the king, by contract, might extinguish the powers of the nation by thus strangling the two great estates of the realm.

He further says: "There is also an implied contract, that the founder of a private charity, or his heirs, or other persons appointed by him for that purpose, shall have the right to visit and to govern the corporation of which he is the acknowledged founder and patron, and also, that in case of

its dissolution, the reversionary right of the founder to the property with which he had endowed it shall be preserved inviolate." John Wheelock, as we have seen, was the principal heir of Eleazer, who founded, if the revival is in law a foundation, the Charity school. The proposition contained in the last clause quoted, was, as we have seen, assumed, on all hands, in the state court to be correct. There are authorities which fully sustain it, but stated in these broad terms it has, we apprehend, little foundation in principle. In general, the death of a trustee does not annihilate the trust, nor hand the fund over to the creator or his heirs. Chancery supplies a new trustee, and the blessings of the trust flow on. Corporations in England were liable to die, as well as individuals. Sometimes Parliament and sometimes the courts acted as headsmen. He thus states the consideration of such grants: "The obligation imposed upon them [the grantees] and which forms the consideration of the grant is, that of acting up to the end or design for which they were created by their founder." And finally says: "It appears to me, *upon the whole*, (words which he afterwards repeats in relation to the judgment,) that these principles and authorities prove incontrovertibly, that a charter of incorporation is a contract." It would seem from this, that the naked grant is not protected; or if it is, is so only so far as that may result from these implied obligations. But Mr. Webster, in his great argument in the Bridge case, before the Supreme Court of Massachusetts, (7 Peck. 437,) says: "The legislature cannot grant what they do not possess. The confusion in this case arises from considering these acts of the legislature as laws, whereas they are grants, which are wholly different. A law is a rule prescribed for the government of the subject; a grant is a donation." Of course it would seem strange only to non-professional eyes, that absolute donations are contracts; though they might be puzzled to understand why the gift itself was of so little consequence, and the implied contract was of such vast importance.

Washington devotes the remaining six pages to show, that the enactments in question did "impair this contract." In

proceeding "to mark the distinction between the different kinds of lay aggregate corporations, in order to prevent any implied decision by this court of any other case than the one immediately before it," he says: "We are informed by the case of Phillips v. Bury, which contains all the doctrines of corporations connected with this point, that there are two kinds of corporations aggregate, viz, such as are for public government, and such as are for private charity." * * *

"There is not a case to be found which contradicts the doctrine laid down in the case of Phillips v. Bury," summarizing the dicta in that case. "Such legislative interferences [altering, etc., the charters of public corporations] cannot be said to impair the contract by which the corporation was formed, because there is in reality but one party to it, the trustees or governors of the corporation being merely the trustees for the public, the *cestui que trust* of the foundation. The trustees or governors have no interest, no privileges or immunities, which are violated by such interference, and can have no more right to complain of them than an ordinary trustee who is called upon in a court of equity to execute the trust. They accepted the charter for the public benefit alone, and there would seem to be no reason why the government, under proper limitations, should not alter or modify such a grant at pleasure." * * * "In short, does not every alteration of a contract, however unimportant, even though it be manifestly for the interest of the party objecting to it, impair its obligation?" To sustain the distinction between public and private corporations, he cites the opinion of the majority of the court in Terrett v. Taylor, saying: "In respect to public corporations which exist only for public purposes, such as towns, cities, etc., the legislature may, under proper limitations, change, modify, enlarge or restrain them, securing, however, the property for the use of those for whom, and at whose expense, it was purchased."

We shall hereafter see what weight is to be attached to Phillips v. Bury.

In concluding, he holds, that whether Dr. Wheelock was the founder or not would make no difference with the decis-

ion. He cites but few authorities, and those, aside from *Phillips v. Bury*, *Fletcher v. Peck* and *Terrett v. Taylor*, etc., of no special pertinence. It may deserve consideration whether his doctrine in relation to trustees of public corporations does not, in the absence of particular constitutional provisions or special regulations, apply to all corporations.

The decisions in the American courts are diametrically opposed to each other. Even that great master of the law of municipal corporations, Judge Dillon, can neither reconcile them nor invent a common ground upon which they can stand. One class of cases holds that the legislature has not only absolute power over municipal corporations, but over their property; another class holds that such corporations have a dual nature—are legal hermaphrodites; that the public side, being the creature of legislative breath, can be annihilated by the same, but that the private part is in effect an individual, suspended, like Mohammed's coffin, somewhere between the heavens and the earth, under the protection of the courts, and more especially of the obligation clause.

The Supreme Court of New Hampshire, in a recent case, *Spaulding v. Andover*, 54 N. H. 38, carried the reasoning of Washington and the authorities on which he relied, to their logical consequences, and held, in effect, that a legislature could, through a public statute, contract by implication with a town, and that that contract was protected against all subsequent enactments by the obligation clause, the same as if the state had contracted with an individual.

At the February term, 1824, five years after the decision in the college case, *Ogden v. Saunders* was first argued by Webster, for Saunders. This was *assumpsit* brought by Saunders, of Kentucky, against Ogden, of Louisiana, upon bills of exchange, drawn on September 30, 1806, by Jordan, of Kentucky, upon Ogden, and accepted by him in New York, of which state he was at that time a citizen. Ogden had been discharged under the act of the New York legislature of April 3, 1801, for the relief of insolvent debtors. The case having been continued about three years for advisement, was re-argued by Webster at the January term, 1827. In

guarded terms, he thus states his general position with ^{refer-}ence to the decision, and the opinion of Judge Marshall, in *Sturges v. Crowninshield*: "To the decision of this court, made in the case of *Sturges v. Crowninshield*, and to the reasoning of the learned judge who delivered that opinion, I entirely submit; although I did not then, nor can I now, bring my mind to concur in that part of it which admits the constitutional power of the state legislatures to pass bankrupt laws, by which I understand those laws which discharge the person and the future acquisitions of the bankrupt from his debts. I have always thought the power to pass such a law was exclusively vested by the constitution in the legislature of the United States. But it becomes me to believe that this opinion was, and is, incorrect, since it stands condemned by the decision of a majority of this court, solemnly pronounced." He adds: "This leads us to a critical examination of the particular phraseology of that part of the above section which relates to contracts. It is a law which impairs the obligation of contracts, and not the contracts themselves, which is interdicted. It is not to be doubted that this term, obligation, when applied to contracts, was well considered and weighed by those who framed the constitution, and was intended to convey a different meaning from what the prohibition would have imported without it." * * * * * "The universal law of all civilized nations, which declares that men shall perform that to which they have agreed, has been supposed, by the counsel who have argued this cause for the defendant in error, to be the law which is alluded to; and I have no objection to acknowledging its obligation, whilst I must deny that it is that which exclusively governs the contract. It is upon this law that the obligation, which nations acknowledge to perform their compacts with each other, is founded, and I, therefore, feel no objection to answer the question asked by the same counsel—what law it is which constitutes the obligation of the compact between Virginia and Kentucky—by admitting that it is this common law of nations which requires them to perform it. I admit, further, that it is this law which creates the obligation of a contract,

made upon a desert spot, where no municipal law exists, and (which was another case put by the same counsel) which contract, by the tacit assent of all nations, their tribunals are authorized to enforce." * * * * "It is then the municipal law of the state, whether that be written or unwritten, which is emphatically the law of the contract made within the state, and must govern it throughout, wherever its performance is sought to be enforced."

Judge Story was about thirty-nine years of age when he drew up his last opinion in the college case. This great lawyer was born at Marblehead, Massachusetts, September 18, 1779. He graduated at Harvard in 1798, read law at home with Judge Sewall, from that time till January, 1801, when he removed to Salem, and read with Judge Putnam, till he was admitted to the bar, in July of the same year. He was a member of the lower house for the years 1805-8; was re-elected in 1810-11; was speaker during his last term until he resigned, January 17, 1812, to take his place upon the Supreme Bench, which office he held until his death, which occurred September 10, 1845. In 1806-8 he supported the embargo with marked ability, and in 1808 was elected to Congress and became the most efficient instrument of its repeal. His mental and physical constitution were both of the most elastic character. Without a stain of impurity, he had an ardent social nature, was open, lavish in his kindness to those he liked, and was a most delightful companion, even when in later years he sometimes wearied with his egotism, as he warmed with the recital of his early combats, "shouldered his crutch and showed how fields were won." From childhood he was ambitious beyond measure, and determined to be "the captain or nothing;" he was as proud of his plumage as any bird or woman, and as sensitive and sore as either when it appeared to him that any attempt had been made to mar or despoil it. If such attempts were in any degree successful, though he sometimes forgave, he seldom tolerated the presence of their authors, and never forgot them or ceased to feel the smart. Swift of apprehension, he read

everything, remembered it, put it away in order, and held it all times at his command; in orderly industry and power of application he had no rival at the bar or on the bench; his power for the acquisition of knowledge bordered upon the marvellous; he was as busy as the "fatal sisters;" he laid all under contribution; he was the Amazon which made tributary every rill of personal anecdote or political gossip.

As a law lecturer there never was his like; he was a full reservoir; ready, fluent and never hesitating for a word, the flood poured at command, as zesty and sparkling as a river of champagne. He had all that New England shrewdness and practical judgment in business matters and the common affairs of life which Marshall so much lacked. No sane man was likely to tell the "sapling story" at his expense. He was a born politician and manager of men; he knew every phase of human nature, and how to deal with it. When the occasion required, he had the courage of his opinions as but few men have.

* His labors were almost incredible. Besides other duties, which were enough to crush most men, he framed many of the most important acts ever adopted by Congress or pressed upon its attention—the credit of which was usually taken by others—and for thirty-three years turned out decisions, opinions, volumes of reports and huge treatises upon legal topics, with the velocity of a patent machine. He was the great source of legal and political learning from which Webster, and others scarcely less noted, drew, in their debates in Congress and elsewhere. His opinions will probably stand higher in the hereafter than his text-books, except his works on the conflict of laws and the constitution.

Many of his earlier opinions in the circuit-court are invaluable. They are replete with learning, and filled with light. His opinions in the vast fields of jurisprudence, involving private rights, were generally well founded; but where some protégé of his was to be affected, either as counsel or suitor, where the construction of some pet statute framed by him was involved, or where certain constitutional questions were raised, he was not, from his peculiar organization

and proclivities, enabled to see things as others saw them.

Whole chapters in some of his books seem to be little more than windrows of head-notes, raked together as the farmer rakes his hay in the mow-field ; but when we survey the ground, the wonder is, not that they contain so many imperfections, but that his work was so well performed.

In 1801, he went into practice in Salem, less from choice than because he knew of nowhere else to go, and in a little more than ten years was elevated to the Supreme Bench. For three or four years his practice was quite limited, because branded for his political and religious views by the Federal aristocracy among whom he had cast his lot. Few who know the New England of to-day can realize the despotic power of this autocracy in Story's youth and early manhood, unless they have felt it themselves, or been reared in the atmosphere and traditions of those who have. Its heart was in the larger places, but its influence radiated to almost every town and hamlet in New England. Webster had a vivid appreciation of its sway when he wrote to Porter on June 4, 1802, "It [Federalism] unites in its support more than two-thirds of the talent, the character and the property of the nation. This is too much for any administration to contend with ;" and when he cautioned his wife, the gentle and winning Grace, upon her visit to his native town, to pay due attention to "the Salisbury *quality*." It varied in its components according to localities, but in essence it was the same everywhere. It was agglomerate in its nature, but courtly, well dressed and immensely dignified. It was a religious and political aristocracy united with one of birth, lineage, wealth, culture and talent. A young man of genius, poor and ambitious, was received by it with imposing dignity and a lofty courtesy, and if properly submissive, in time, by its aid, might hope to be "somebody." But if he dared in religious and political matters to do his own thinking, he was tabooed in social and business life, the "freezing-out" process was resorted to, and when that failed, he was surrounded with a cordon of fire and left to suffocate. Even at a later day, Worcester, the favorite preacher of Judge Webster as

well as Daniel, suffered martyrdom because he believed with Channing. So long as he drifted with the tide, even through the turmoils of the college controversy, all was well; but when he looked back toward Unitarianism, a fate less merciful than that of Lot's wife befel him. With exceptional cases, few natures were hardy and self-reliant enough to withstand the pressure.

Dr. Story was a man of ability, an anti-Federalist of the most decided stamp, and took the side of Jefferson. The son, impulsive, warm hearted and devoted to his father, inherited the latter's views and convictions, and, in consequence, became very unpopular; was ostracized and treated with such offensive personalities, that he seriously contemplated a removal to Portsmouth, N. H., or Baltimore, Md., to escape this persecution. In his later years, after he had taken the long stride from the school of Jefferson to that of Jay, and, in consequence, had become the idol of those who had once sought to destroy him, with his feelings mellowed by time and his associations, he gives us this portraiture of his persecution: "At the time of my admission to the bar, I was the only lawyer within its pale who was either openly or secretly a *Democrat*. Essex was, at that time, almost exclusively federal, and party politics were inexpressibly violent. I felt many discouragements from this source." * * * *
"To young men with my political opinions, the times were very discouraging. My father was a Republican, as contradistinguished from a Federalist, and I had naturally imbibed the same opinions. In Massachusetts, at that period, an immense majority of the people were Federalists. All the offices (with scarcely an exception, I believe,) were held by Federalists. The governor, the judges, the legislature, were ardent in the same cause. It cannot be disguised, too, that a great preponderance of the wealth, the rank, the talent and the civil and literary character of the state, was in the same scale. Almost all the profession of the law were of the party. I scarcely remember more than four or five lawyers in the whole state who *dared* avow themselves Republicans. The very name was odious, and even more offensive epithets

(such as 'Jacobins') were familiarly applied to them. The great struggle was just over between Mr. Jefferson and Mr. Adams, and the former had been chosen to the presidency. The contest had been carried on with great heat and bitterness; and the defeated party, strong at home, though not in the nation, was stimulated by resentment, and by the hope of a future triumph. Under such circumstances, there was a dreadful spirit of persecution abroad. The intercourse of families was broken up, and the most painful feuds were generated. Salem was a marked battle-ground for political controversies, and for violent struggles of the parties. The Republican party was at first very small there; and its gradual growth and increasing strength, so far from mitigating, added fuel to the flame.

"Such was the state of things at the time when I came to the bar. All the lawyers and all the judges in the county of Essex were Federalists, and I was the first who was obtruded upon it as a political heretic. I was not a little discouraged by this circumstance, and contemplated a removal as soon as I could find a better position or prospect elsewhere. For some time I felt the coldness and estrangement resulting from this known diversity of opinion; and taking, as I did, a firm and decided part in politics, it was not at all wonderful that I should be left somewhat solitary at the bar."

In his letter of March 30, 1803, to Duvall, afterwards the dissenting judge in the college case, declining the position of naval officer at Salem, while expressing his gratitude for the appointment, Story says: "To one just entering life, without patronage or support other than what must be derived from juridical pursuits, and at a period when persons older in the profession are so numerous as to absorb almost all lucrative business, it was a circumstance peculiarly grateful. If the extreme degree of virulence with which I have been persecuted, in a county where all the judges and lawyers are pertinaciously Federal, and the manifest attempts to close against me the doors of professional eminence be added to these considerations, you will readily perceive that there exist great inducements for me to accept the proposed office, and

thereby secure to myself a moderate independence and freedom from oppression." * * * "I have long had a desire to migrate southward, in order to find a situation in which I should have only to compete with the ordinary obstacles of my profession. In your leisure, should you recollect any situation favorable to my views, the information would be grateful to me."

In his letter of June 6, 1805, to his classmate, Williams, in Baltimore, he says: "Your account of Baltimore charms me. I have long had a desire to sojourn in some southern clime, more congenial with my nature than the petty prejudices and sullen coolness of New England. Bigoted in opinion, and satisfied in forms, you well know that, in ruling points, they too frequently shut the door against liberality and literature. A man who will hazard a noble action is not less exposed than certain notorious saints of old. Indeed, if I mistake not, the same spirit, under different forms, is revived, though I have good reason to believe we have no *witches* amongst us. Could I obtain any respectable situation in your pleasant climate and hospitable city, I hardly know how I could refuse it."

Notwithstanding his after-acquired dislike of "Virginia politicians" and the southern people, he seems to have retained his kindly feelings toward Baltimore, for, at a later day, he had serious thoughts of resigning his place upon the bench and taking the cast-off sandals of great Pinkney.

In the letter from which we have just quoted, he further says: "My situation is pleasant here, so far as it respects friends. The whole Republican party are my warm advocates. Federalism has persecuted me unremittingly for my political principles; but, as my life has been sacredly pure, they do little else than accuse me of 'being a Bonaparte in modesty and ambition.' Convinced every day more and more of the purity of the Republican cause, and believing it to be founded on the immutable rights of man, I cannot and will not hesitate to make any sacrifice for its preservation. Yes, my dear friend, though I have suffered the hardness of oppression, I feel satisfied that at least I am not mistaken for a de-

pendant or a minion." (1 Life of Story, 95-106.) His practice steadily increased in his own state, and for some years, until its more pressing duties nearer home compelled him to relinquish it, he had a respectable business in Rockingham county, New Hampshire.

The tide had turned; the spirit which inspired Thompson's letter to Prof. Adams, from which we have already quoted, to "put down a certain man," was baffled; Story had won. Henceforth he became a leader of his party, and occupied that position until he went upon the bench. "Owing to the fact," he says, "that there were few professional men in the commonwealth at that time belonging to the Republican party, and of those few scarcely any in the legislature, I was soon compelled, notwithstanding my youth, to become a sort of leader in debate, and I may say that I occupied that station *de facto* during all my legislative life."

His appointment to the bench at the early age of thirty-two is not to be ascribed to his merits, marked as they were. It was due to the "accident of circumstances." Judge Cushing, a feeble old man, seventy-seven years of age, died in 1810. The position "belonged," in the phrase of the politicians, to Massachusetts proper and to the party in political affiliation with the administration. The range for a proper selection there was exceedingly limited. Nobody thought of Story. Mr. Madison, who knew him well, on January 3, 1811, appointed Levi Lincoln, who had been the attorney-general of Jefferson, and the acting secretary of state before Madison assumed the duties of the office, to fill the vacancy, and personally pressed him to accept it. But Lincoln was compelled to decline, because of the blindness that was creeping fast upon him. John Quincy Adams was appointed in the place of Lincoln, February, 22, 1811, and declined upon the ground, as is understood, that his tastes and mind were not judicial, and because he preferred to retain the position which he then held as ambassador to St. Petersburg. In this dilemma, Mr. Bacon, a member of the House of Representatives from Massachusetts, and his personal friend, suggested the name of Story. Very much to the surprise of the

latter, Madison appointed him. He was confirmed November 18, 1811, and took his seat at the next term of the Supreme Court.

What was generally thought of this appointment at the time, and especially by his political opponents, is thus stated by the partial pen of his son: "The ability and learning displayed by him at the bar, as well as the spotless character with which he had passed through the fiery ordeal of politics, had won for him the respect and confidence of a large class. But there were not wanting those who looked upon his elevation with an inauspicious eye. Party animosities were then very bitter, and among his political opponents his appointment was ridiculed and condemned. Bigoted in their prejudices, some honestly thought that none but a fool or a knave could entertain Republican opinions; and others, from his youth and active political course, augured a multitude of evil consequences."

[TO BE CONTINUED.]

III. NOTES OF CURRENT EUROPEAN LAW.

(3).

It has been said that the salient feature in the development of modern law has been its passage from the form of a law of status to that of a law of contract. The remark has been repeated so often that it seems to be accepted almost as a truism, and as applicable to the entire field of law. Yet, in fact, it has but a limited application, and is entirely misleading when it is taken to prove that questions of status are less numerous or less interesting than they were in early law.

What is true undoubtedly is, that the dissolution of the family as a legal unit (in the sense in which Sir Henry Maine has made the term so familiar to common lawyers) has left many things to be regulated by the free contract of the parties, which formerly were determined by their status, without or against their will. The slave and the adult son long ago became independent persons, free from the *potestas* which formerly fettered their action. The relation of master and servant has ceased to be a true status (in English law) within the century since Blackstone wrote. And the last and most striking change of this kind began within the memory of the present generation, and is yet far from complete, in spite of the very great advance it has recently made. We refer, of course, to the relation of husband and wife, and to the legislation of England and America by which she, who was formerly merged in the being of the husband, has become for many purposes a person capable of contracting, not only with others, but even with her husband. In all these respects, it is true that the development of law has been the growth of individual freedom. The recognition of independent personality is the recognition of equality before the law, and hence of freedom to regulate conduct by one's own contract.

But it does not follow from this, as has sometimes been hastily assumed, that the law of status has lost its importance or shrunk in extent. On the contrary, it has grown almost as rapidly as any part of the law. For proof of this, we need only look at the many complicated questions of status which arise from the conflict of laws; — questions entirely unknown to the ages when to be a foreigner was simply to be a nullity devoid of all rights, incapable of all relations. The entire field of private international law is a modern creation, all of which depends, directly or indirectly, upon the rules of personal status. No topic deserves more attention from the common lawyer, and in none will he find himself more dependent upon the study of foreign authorities. We make no apology, therefore, for devoting the present article to a case which has attracted more attention, perhaps, on the Continent than any other recent case of purely scientific importance.

The principal facts of this interesting case are these: Henriette Valentine de Riquet, countess of Caraman-Chimay, and a Belgian by birth, although actually a native of France,¹ was married to the Prince de Bauffremont, a French officer. The marriage was not a happy one. The lady's conduct was irreproachable, but her husband's habits were, to use the language of the court in the decree hereafter to be mentioned, "habits of licentiousness and misconduct, attested by repeated acts incompatible with the dignity of marriage, inexcusable in any rank of life, and especially hurtful and injurious in the high social position he held." The result was a separation and suit for the only divorce known to the French law, the *séparation de corps et de biens*, or divorce from bed and board. After a long process, this relief was granted by the *Tribunal Civil de la Seine*, April 7th, 1874; confirmed by the ap-

¹ The princess is a daughter of M. Joseph de Riquet, Prince of Caraman-Chimay, formerly in the diplomatic service of the King of the Belgians, but domiciled at Menars, in the department of Loir-et-Cher, where the princess was born, and where she had her domicile after the divorce. Menars is a small town on the railway from Orleans to Tours, eleven miles northeast of Blois.

pellate court, August 1st, 1874. The decree, after assigning the reasons quoted above, declares the Princess de Bauffremont *separée de corps et de biens* from her husband, and forbids the latter to trouble her in the domicile that she shall choose. It also gives to her the guardianship and exclusive direction of the two children born of the marriage.

Some time in the following winter or spring,—the exact date nowhere appears in the proceedings published,—the princess removed her residence to the city of Altenburg, in the duchy of Saxe-Altenburg, a part of the German Empire. Whether this change of residence was made in good faith as such, or was only chosen to escape the operation of the French law, which forbade her marriage during the life of the Prince de Bauffremont, is a point in dispute; but we nowhere find in the documents accessible to us any evidence on which a judgment upon this question, as a question of fact, can be formed.

She applied for naturalization as a German, producing in support of the application a certificate of the mayor of Menars that she was *separée de corps et de biens* from the Prince de Bauffremont, that she was in the full enjoyment of all civil rights, and of the capacity to exercise them; also another from the same official, that she was of good life and character, and had the high esteem and general consideration of her former neighbors; and finally, a certificate of the person who had charge of her property, M. Roche, of Paris, who attested that she had in her disposal a fortune of 2,400,000 francs (nearly half a million dollars), and enjoyed a rental of 35,000 to 40,000 francs.

On the third of May (1875), the princess became a naturalized German citizen in the duchy of Saxe-Altenburg. The certificate of naturalization is so brief that it may be given in full in an English translation:

“The undersigned, ducal minister, hereby certifies that Dame Marie Henriette Valentine de Riquet, Countess of Caraman-Chimay, divorced (*geschiedene*) Princess of Bauffremont, from Menars, at her own request, and in behoof of her settlement in Altenburg, has acquired the citizenship of Sachsen-Altenburg.

"This certificate of naturalization gives all the rights and duties of a citizen of Sachsen-Altenburg from the date of its delivery, but only for the person therein expressly named.

"Altenburg, the 3d of May, 1875.

"Ducal Saxon Ministry, Department of the Interior, *Ad interim*, "LEMAN."

Little more than a month elapsed after this naturalization, when the princess, through her friend, General von Wedell, obtained from the proper authorities in Altenburg the following certificate:

"The municipal council of the city of Altenburg certify by these presents that they know of no civil impediment whatever that can hinder, on the part of the authorities of this city, the new marriage which Dame Marie Henriette Valentine de Riquet, Countess of Caraman-Chimay, divorced Princess of Bauffremont, proposes to contract.

"Altenburg, June 9, 1875."

The marriage so referred to actually took place, October 24th, 1875, at Berlin, before the civil authorities. The *Acte de mariage* contains a full description of the parties, and its form will interest American readers enough to justify its translation in full:

"Berlin, the 24th October, 1875, at 9:15 A. M.

"Before the undersigned civil officers appeared this day, as intending marriage:

"1. His Highness Prince George Bibesco, (whose identity is proved by Carl Friedrich Drews, royal counsellor of justice, advocate, attorney and notary, personally known to us,) of the Greek-Catholic religion, forty-one years of age, born at Bucharest, Wallachia, residing at No. 22, Boulevard de Latour-Maubourg, in Paris, son of His Highness Prince George Demetrius Bibesco, formerly reigning prince of Wallachia, who died at Paris, and of the Princess Zoe Brancovino, his wife, residing at Bucharest.

"2. Dame Marie Henriette Valentine de Riquet, Countess of Caraman-Chimay, divorced (*separirte*) Princess of Bauffremont, (identified in the same manner with the bridegroom,) of Roman Catholic religion, thirty-six years old, born at the

castle of Menars, department of the Loir-et-Cher, France, residing at Altenburg and at No. 1, Potsdam Place, Berlin, daughter of His Highness M. Joseph de Riquet, Prince de Caraman-Chimay, formerly ambassador and minister plenipotentiary of His Majesty the King of the Belgians, at the castle of Chimay, province of Hainaut, Belgium, and of Dame Louise Marie Françoise Josephine de Pellapra, his wife, who died at the castle of Menars:—and as witnesses:

“3. His Highness Prince Gregory Brancovano, (identified in the same manner with the bridegroom and bride,) forty-seven years old, residing at No. 22, Boulevard de Latour-Maubourg, Paris.

“4. Major-General Frederick von Wedell, (identified in the same manner with the preceding witness, (sixty-one years old, residing at No. 18, Schillerstrasse, Dresden.

“The bridegroom and bride personally declared, in presence of the civil officers and the witnesses, their purpose to contract marriage with each other.

“Read, approved and signed.” (Here follow signatures of all the persons above named, and of the officials.)

Prince Bibesco and his bride were also united on the same day by a religious ceremony, after the forms of the Greek church, by the pope of that church residing in Dresden.

The Prince de Bauffremont immediately brought an action against the princess before the civil tribunal of the Seine, at Paris, for the purpose of having the German naturalization and the second marriage declared null and void. A judgment in this action was rendered March 10th, 1876. The court expressly declines to consider how far those acts may be valid outside of France, under the German law, and limits its decision to the question whether they were violations of French law, and the effect they produced on rights under that law. It bases its decision of these points on the following reasoning: The wife cannot, without her husband's consent, do any act which involves her patrimony, and, *a fortiori*, cannot change her status or nationality. This rule is intended to maintain the husband's authority as head of the family, and therefore lasts as long as the marriage exists.

The *séparation de corps et de biens* relaxes, but does not sever, the bond of marriage: it releases the wife from the duty of cohabitation, and therefore allows her to select for herself a domicile apart, but not to change her nationality. She cannot, therefore, without her husband's consent, acquire a permanent domicile in a foreign country, without hope of return; since, by sec. 17 of the French Civil Code, such an act of itself is a loss of French nationality. The German naturalization being void, it necessarily follows that the second marriage is so, since, as a French citizen, she was still the wife of Prince de Bauffremont. The tribunal further rests its decision on the ground that the naturalization was not obtained in good faith, with the intention of really becoming a German, but was sought as a mere means of evading the French law; as evidence of which they refer to the fact that the princess, by her second marriage, had given up her German citizenship almost as soon as it was acquired. Such a fraud upon the law, in a matter of status affecting the public order, could not be valid even with the husband's consent.

The judgment therefore declares both naturalization and second marriage void, forbids the princess to bear the name of Princess de Bibesco, condemns her to bear the costs of the action, and reserves to the Prince de Bauffremont his right to institute other criminal and correctional proceedings.²

Although the princess might easily escape all personal consequences of this judgment by remaining out of France, yet she is naturally unwilling to submit to the imputations contained in the French judgment, to say nothing of its effect upon her very large property in France. The controversy derives interest not only from the social rank of the immediate parties, the amount of property involved, and the delicate nature of the questions at issue, but still more, as we have

² We learn from a passage in the argument of Prof. Bluntschli, that proceedings of this kind have also been instituted in France by the Minister of Justice, in the name of the State. We have not seen, however, any copy of these proceedings, and it would seem from Bluntschli's account of them that they add no new grounds to those on which the private judgment was based.

already intimated, from the scientific importance of those questions in the field of international law. It has already been discussed by some of the most eminent continental jurists, whose arguments on both sides we purpose briefly to state.³

It may conduce to brevity, however, if we first state the principal provisions of law, both French and German, involved in the discussion.

The French law, as is well known, still adheres to the strict Catholic doctrine of marriage, based on its religious character as a sacrament, which does not admit a dissolution of the tie, or absolute divorce, for any cause. The admission of a divorce was one of the reforms demanded and obtained by the first French Revolution, and was granted by a law of 1792. The Code Napoleon, in its original form, recognizes both kinds of divorce, absolute and partial; and such is still the law of Belgium, and some other countries which have adopted the French code without the later modifications it has undergone in its native land. But in 1816, after the restoration of the Bourbons and the triumph of reactionary principles, the absolute divorce was again abolished, and the *séparation de corps* has ever since remained the only relief possible in France for an injured wife or husband. The French courts, however, recognize the validity of foreign divorces, and allow a party regularly divorced abroad to marry again in France.

³ M. Labbé, professor of law in the University of Paris, has published an article defending the French judgment in the *Journal de Droit International Privé*, II, 409-421, Nov.-Dec., 1875. Professor von Holtzendorff, professor of law in the University of Munich, has published in the same journal (III, 5-15, Jan.-Feb., 1876) an article on the other side, and Professor Bluntschli, of the University of Heidelberg, has written on the same side in the *Revue Pratique de Droit Français*. An article also criticising the judgment, by a French professor at Douai, M. de Folleville, in the *Revue du Notariat*, we have not seen. The articles of the two distinguished German publicists, whose names are so well and favorably known on this side of the Atlantic, have both been published in separate form, and the present writer has the honor of acknowledging the receipt of a copy of each, with invitations to express his own opinion,—invitations which must be his apology for the freedom with which he has ventured to deal with the arguments of such masters of the subject.

The general effects of the separation, as measured by the French law itself, may be stated thus: The matrimonial tie remains; but its effect upon the personal freedom of the wife is annulled, or at least suspended, until that mutual reconciliation which in theory is always to be hoped for, as the moral duty of the parties. The wife is freed from the obligation, otherwise incumbent upon her, to share the domicile of the husband, and to follow his changes of residence; she can live where she pleases, and change her domicile without consulting him. With regard to property, she must still obtain her husband's consent for the sale of immovables, (or that of the court, if he refuses,) but may freely dispose of her moveables, and manage her property in general.⁴

That she can choose a domicile out of France, as well as in it, seems to be generally agreed.⁵ Can she also become naturalized abroad without the consent of her husband, or, failing that, of the proper tribunal? That is the very question at issue in the present case.

The French law recognizes the right of expatriation explicitly: with regard to persons *sui juris*, at least, there can be no doubt on this point. It also declares that French citizenship is lost, *ipso facto*, by a naturalization or permanent residence abroad, and that a Frenchwoman marrying a foreigner acquires the nationality of her husband.⁶

⁴ Code Civil, § 1,449. La femme séparée, soit de corps et de biens, soit de biens seulement, en reprend la libre administration.

Elle peut disposer de son mobilier et l'aliéner.

Elle ne peut aliéner ses immeubles sans le consentement du mari, ou sans être autorisé en justice à son refus.

With much diffidence, we venture the remark that the arguments drawn from this section on either side hardly seem to us conclusive. The section is evidently a rule of property, not of status. It applies equally to the wife *separée de bien seulement*, and therefore if any argument could be drawn from it, it would be that the status of the wife was entirely unaffected by the separation,—which would plainly prove too much.

⁵ See the authorities quoted by Professor von Holtzendorff, § 4. Elle peut dès lors fixer sa résidence où bon lui semble, aussi loin qu'elle voudra de celle de son mari, fût-ce même en pays étranger. Demolombe, Traité de la Separation de Corps, II, No. 498.

⁶ Code Civil, § 17. La qualité de Français se perdra, (1) par la nat-

Leaving the interpretation of these rules to be discussed hereafter, we now turn to the German law bearing upon the present case. It is less easy to state with precision than that of France, not merely because Germany has not been, like France, a unit in respect to legislation, but because the laws themselves (at least in some points) are not so free from doubt or confusion.⁷

From the time of Luther, Germany has always recognized the dissoluble character of the marriage tie, and absolute divorces have been granted, though separation was also known under its title of divorce from bed and board. At least three different systems prevailed in different parts of the present empire.⁸ The limited divorce, with a life-long incapacity for second marriage, was the rule of the kingdom of Saxony; in other places, as in Alsace and Lorraine since their reunion with Germany, such a divorce may be converted into an absolute one by a decree of the court, on the application of either party; and thirdly, in Prussia, the Saxon duchies, Baden, etc., the divorce from bed and board is by the law itself converted into a dissolution of the marriage tie. This was the rule in Prussia from 1794 down to the time when it was superseded by the law of the German Empire, mentioned in a previous note.⁹

uralisation acquise en pays étranger; * * * (4) enfin, par tout établissement fait en pays étranger sans esprit de retour.

§ 19. Une femme Française qui épousera un étranger suivra la condition de son mari.

⁷ Thus we find such eminent authorities as the Professors Bluntschli and von Holtzendorff differing from each other upon so important a point as the application of the Prussian code, § 734, to the case before us; and we have sought in vain through all the discussions of the case for a clear and positive statement of the law of Saxe-Altenburg as it stood prior to January 1st, 1876.

⁸ Bluntschli, *De la Naturalisation*, etc., § 4, pp. 15, 16.

For the law of the German Empire on this subject, since January 1st, 1876, see the first article of the present series in *SOUTHERN LAW REVIEW*, January, 1876, p. 653.

⁹ See preceding note. *Preussische Landrecht*, § 734: "If a permanent separation from bed and board has been judicially decreed between Catholics, it has all the civil effects of a divorce." Professor Labbé dis-

The subject of naturalization in Germany is regulated by a law of the North-German Confederation, dated June 1, 1870, which is now recognized as a law of the German Empire by a supplementary provision of its constitution, dated April 16, 1871. The eighth section of this law reads as follows:

“Naturalization papers are to be granted to foreigners—

“(1) If they can, according to the laws of their own country dispose of their persons;¹⁰ or if, wanting this capacity, they have the authorization of a father, tutor, or curator;

“(2) If their conduct is blameless;

“(3) If they have a residence, owned or hired, in the place where they wish to settle;

“(4) If they are in condition to provide for their own support and that of their families, according to the circumstances of the place.”

It need hardly be stated, after what has already been said, that no question arises upon the fulfillment of the 2d, 3d, and 4th of these conditions by the princess. All turns upon the first. If she was *dispositionsfähig*, her naturalization was perfectly valid; and this being so, it follows that as a German she applies the application of this section to foreign separations, because it is not to be presumed that the Prussian legislator was making a law for the separated couples of the entire globe, and there is nothing to limit the application of the rule except the extent of the legislator's jurisdiction. But for this very reason, the fair interpretation seems to be that the rule extends to all Catholic couples who come within that jurisdiction, wherever the separation may have been pronounced. This may also fairly be inferred from the royal ordinance of August 17th, 1815, which extends the same rule to the case of Lutheran couples separated from bed and board in countries that do not admit absolute divorce, if they settle in Prussia.

¹⁰ In the German original, the word used is *dispositionsfähig*. Professor von Holtzendorff disputes the sense given in the translation above, holding that the term refers to the capacity of disposing, not of one's person, but of one's goods. Such also seems to be the understanding of the French authorities who gave to the princess the certificate mentioned above, in which they attested that she was “*apte à contracter*.” But in a question of language, upon which a foreigner cannot presume to offer an opinion, I have thought it best to follow the French translation, in which both MM. Labbé and Bluntschli agree.

man citizen, governed by the law of the German Empire, her second marriage was lawful. And it would seem to follow, further, that it must be recognized as lawful everywhere, whatever doctrine we adopt on this point,—whether we hold that its legality is to be tested by the law of the place where the marriage was celebrated, by that of the domicile, or by that of the nationality of the parties.¹¹ This, of course, is on the assumption that the change of domicile and naturalization were actual changes, made in good faith. The French tribunal bases its last judgment, annulling these in France, partly on the ground that they were not in good faith, but were mere devices to escape the prohibitions of the French law, so as to marry again, and to give up the new citizenship as soon as acquired. If this charge is well founded, it presents altogether a different case, and it may as well be disposed of before going further. The doctrine is indisputable, but we think the German jurists present a complete answer to its application in the present case. The courts of every country are entitled and obliged to treat as nullities acts performed in a foreign country by their own citizens, however regular and legitimate they may be by the *lex loci*, if the actors have gone abroad to evade the domestic laws, and return to enjoy the results of that evasion. It is not the going abroad to find a different rule that constitutes fraud upon the domestic law: it is the return and the attempt to claim, by virtue of the foreign act, rights and privileges which the domestic law does not sanction. We know of no other case in

¹¹ The different doctrines are stated by Bluntschli, § 7, pp. 26–29. He gives the following references: Story, Conflict of Laws, §§ 59, *et seq.*; Wharton, Conflict of Laws, § 95; Savigny, System, tom. VIII, § 346; Von Bar, Droit Civil International, §§ 327, *et seq.*; Renaud, Droit Privé, I, 109; Foelix, Traité du Droit International, par Demangeat, I, p. 66, *et seq.*; Laurent, Principes du Droit Civil, I, p. 121, *et seq.*; Brocher, in Revue du Droit International, III, 432, and IV, 197. To these may be added the learned essay of Mr. William Beach Lawrence, Étude de Legislation Comparée et du Droit International sur le Mariage, Gand, 1870, reprinted from the same review, tom. II. See especially pp. 55–70, Des effets dans les différents pays, de mariages contractés entre étrangers ou à l'étranger. We regret that space does not allow extracts from this valuable essay.

which an act has been annulled on this ground before the parties made any attempt to return to the former domicile, and claim again the benefits of the law which they had evaded. Even though the change of domicile may have been made expressly to escape the provisions of an irksome or prejudicial law, that is not of itself a fraud. Unless we go back to the mediæval doctrine of an inevitable allegiance by birth, we must regard it as a natural right for every person to change his nationality when he can better his situation by the change. The laws of a country furnish one of the strongest motives by which immigrants are either induced to emigrate to it, or prevented from so doing. How many young Europeans have come to this country on purpose to escape enforced military service! Yet no European government has ever treated this as a fraud upon their own law, and a reason for disregarding their naturalization here, unless they returned and attempted to enjoy again their original position, without fulfilling its duties. Granting, then, for the sake of the argument, that the only motive of the Princess de Bauffremont in becoming a German citizen was to obtain the right of a second marriage granted by the German laws, this is a perfectly legitimate motive, into which the French courts have no more right to look in estimating the validity of her naturalization than they have to look at her motives of health, or friendship, or economy. It is only on the supposition that she returns at once to France and claims to live there in second marriage as the Princess Bibesco, that they can consider the question whether there had really been at any time an actual change of domicile.

Nor does it make any difference in this respect that her German citizenship was lost as soon as gained by her marriage with a Wallachian husband. If the Prince Bibesco had happened to be a Prussian, her German nationality would have been retained, presumably for the remainder of her life. Yet who does not see that this fact would have been utterly indifferent to the question of the validity of her former change? Only in case she had married a French subject, and thus claimed once more French citizenship, could the charge of fraud upon that law be made.

Professor Labbé, however, does not make this the chief argument against the validity of the princess' acts. Looking at the question entirely from the French side, he says, with great justice, that the French authorities must be governed, in a matter which, like this, affects the public order, by French law only. He discusses the German law merely as a matter of curiosity, or rather of scientific interest; but he claims that even if by that law both naturalization and second marriage were valid, still, the French courts must regard them as null. For a married woman cannot change her nationality without her husband's consent, (or that of the court in his stead,) nor can she appeal as a party in court for any purpose (*ester en justice*), without a like consent. The separation releases her from the need of that consent for certain purposes, but neither of those just referred to is among them. Hence the act of naturalization obtained in Altenburg by the princess, without her husband's consent, is a nullity; and that being a nullity, the second marriage is unquestionably so.

Professor von Holtzendorff, on the other hand, denies that the husband's consent is necessary. The power to choose her own domicile, expressly given to the separated wife, even in a foreign country if she chooses, necessarily implies the power to acquire citizenship there. There is no analogy between this case and that of a sale of immovables; but even if there were, an argument could not be drawn from it. For in that case, the law requires as an alternative, either the consent of the husband, or that of the court of the wife's domicile; but the one alternative having become impossible, since no court in the foreign domicile would intervene in such a case, by a familiar principle, the wife is released from both. Again, by the French code, the husband's consent is required only to acts governed by private law. Naturalization is not one of these; it belongs to an entirely different class, being a matter of public law; and no authority can be found in French law for the requirement of such consent to an act of public law, affecting directly the relations of the individual to the state, and only indirectly the relations of individuals to each other. The naturalization being valid, the German law

transforms the separation into an absolute divorce, and thus makes valid the second marriage. Professor von H. also answers with much force, and substantially as above, the objection derived from the assumption of a fraud on the law.

The opinion of Professor Bluntschli differs rather in form, and in some minor points, than in substance, from that of his learned compatriot. It approaches the question from the side of public law, and sketches in a masterly manner the different doctrines of status, of naturalization and divorce, current among jurists. The reader perceives also a sense of the personal merits of the parties, and a disposition to let moral and patriotic considerations influence the result, which is less evident in the more abstract treatment of the case in the arguments already noticed. We must content ourselves here with the following summary of conclusions, in the very language of the distinguished publicist :

“(1) The naturalization of a stranger or his admission into a new nationality is a sovereign act of the state granting it, solely and exclusively within its own competence.

“(2) The naturalization, on the duchy of Saxe-Altenburg, of the Countess of Caraman-Chimay, a Belgian by birth, French by her marriage with the Prince de Bauffremont, is the sovereign act of the German government, of the validity of which the authorities of Saxe-Altenburg or the government of the German Empire are exclusively competent to judge.

“(3) By the German law, there can be no question of the validity of this act, by which the Countess of Caraman-Chimay became a German and a subject of Saxe-Altenburg. She therefore has the right to invoke the protection of the German Empire.

“(4) The conditions required for the naturalization of a Frenchwoman by a German state have all been complied with. The doubts as to the capacity of the former Princess de Bauffremont raised by the tribunal of the Seine, which is absolutely without jurisdiction in the question of naturalization, are unfounded, and spring from a false interpretation of the German law, which recognizes the freedom of the sepa-

rated wife, and her right to choose a domicile and to expatriate herself.

“(5) By international law, each state is competent to decide in what cases its subjects lose their nationality. In this respect, the French tribunals are competent; and as the French civil code, in order to guard against conflicts with foreign powers, positively decides that every Frenchman naturalized abroad at once loses his French citizenship, the countess, in becoming a German, has lost the character of a Frenchwoman, and cannot subsequently be judged by French law. The French law recognizes the liberty of emigration and such emigration is permitted and irreproachable when its object is to escape from a tyrannical law and to obtain the shelter of a more beneficent legislation.

“(6) Between the law of France and Germany there is this difference: the former, adopting the doctrines of the Catholic church, forbids divorce and does not allow separated consorts to marry again; while the second admits divorce and allows re-marriage, in furtherance of personal liberty and the needs of actual life.

“(7) A Frenchman must submit to French jurisprudence, but a German has the right to enjoy the more liberal and more modern provisions of German law.

“(8) The second marriage of the countess, a German, separated Princess de Bauffremont, with Prince George Bibesco, solemnized at Berlin, is to be judged by German law, and not by French, since it was as German, not as French, that the countess formed it.

“(9) The French courts are competent to decide the personal status of M. de Bauffremont, who remains a Frenchman, but not the status of the princess, who has become a German.

“(10) The opinion that the court which has ordered a separation is competent to judge of a second marriage is long obsolete, and was never supported by decisions. There are three systems in international law:

“*a.* The American system, which applies the law of the place of marriage;

"*b.* The older German system, which applies the law of domicile ;

"*c.* The modern German and French system, which applies the law of nationality.

" And these three systems alike, upon irrefragable grounds, establish the validity of the second marriage of the Princess Bibesco."

For the sake of completeness, we translate also from Professor Bluntschli the following summary of the argument of Professor de Folleville, which has not reached us in full. He recognizes the right of a separated wife to choose her own domicile and nationality, on the following grounds :

" (*a*) According to the old French law, the innocent party, after separation, could enter into a convent without the consent of the guilty one. The monastic vows were civil death. If the mediæval law thus gave the wife the right to a still more complete disposal of her person, we must necessarily grant her the right of naturalization, less important in its consequences.

" (*b*) A Frenchwoman, separated, can freely choose her domicile, even in a foreign country. In some countries domicile of itself confers citizenship. If she chose a domicile in such a country, naturalization would follow as a matter of course. In the absence of any express provision, therefore, emigration with the direct view of naturalization must be regarded as lawful.

" (*c*) A marital authority continued after the separation is contrary to the true character of that act.

" (*d*) To grant the husband a right of *veto* would be to abandon the wife to his caprice and hatred ; it would be in certain cases to prevent the wife from gaining a livelihood, and generally from bettering her situation.

" (*e*) The French laws, and the writers who impose upon the separated wife the condition of obtaining her husband's authorization, apply this rule to matters of pecuniary interest, and not to naturalization, which is purely personal in its consequences.

" (*f*) The admission of the separated wife's incapacity, as

a rule, would produce in this respect the most absurd and most monstrous results; in particular, it would favor the guilty husband, at the expense of the innocent wife, and that in the most scandalous manner."

After so full a statement, not only of the facts and law of the case, but of the opinions formed upon it by the most eminent of European jurists, the reader will no doubt gladly excuse us from any extended account of our reasons for holding that, even by the French law, the Princess de Bibesco should be left in quiet possession of that title, and of the happiness which she may hope to find in a second marriage. Such reasons would for the most part be a mere repetition of those we have already quoted. On one point only we venture an independent suggestion. There seems to us to be a slight inconsistency between Professor Bluntschli's claim that the French courts are absolutely precluded from judging of the validity of the German naturalization, and his admission that each state may determine the conditions upon which its own citizenship is lost as well as acquired.¹² At least, when the exclusive jurisdiction of the German courts is made to rest on the loss of French nationality by the *first* condition of § 17 of the *Code Civil*, there seems to be a vicious circle in the reasoning. The German naturalization is valid, and cannot be impugned in the French courts, because, by the French law itself, it takes away French citizenship. And the French citizenship is lost because there is a German naturalization which the French courts cannot impugn. We must frankly confess that if this were the sole condition upon which French citizenship were lost, we could not escape the conclusion that the French courts must, on Bluntschli's own principles, be allowed to determine the question whether there had ever been a valid German naturalization; or else they could not pass upon the loss of French nationality, which he expressly admits to be within their competence. But the *fourth* condition of the same section places the matter on a very different ground. It condi-

¹² Bluntschli, pp. 7, 8, 29. See also his conclusions (4) and (5) quoted above.

tions the loss of French citizenship on the existence of a mere state of facts, upon the legal validity of which there can be no question. The removal of the princess to Altenburg, her conduct there, her second marriage, altogether constitute an "*établissement en pays étranger sans espoir de retour*," if any facts could; and the law expressly determines the legal significance of such facts as a loss of French citizenship, after which the French tribunals have only to judge the princess as a German citizen.

It is true that the French tribunal has expressly found, that she could not make such an establishment abroad without her husband's authorization; but in doing so, they have confounded two entirely different things; or, as an American lawyer would say, they have mixed up questions of fact and law. The naturalization may be a question and an act of law, to which the husband's consent was needed. We admit this for argument's sake, though we see but little force in the argument that it must be so because the wife *not* separated cannot *ester en justice* without the husband. But the establishment abroad is a mere matter of fact; no naturalization, no *acte* of any kind is needed to perfect it; it is accomplished by a perpetual change of domicile, by the fact of marriage, by any other change that takes away the expectation of return; and as it is admitted by all the authors that the separated wife may domicile herself abroad, as the tribunal has itself ordered him to allow her to choose her domicile without interference from him, we do not see the slightest ground on which it can impose upon her the necessity of obtaining his consent to a mere change of fact. The code does the rest, and declares what interpretation the French courts shall put on such a fact. Whether legally naturalized or not at Altenburg, in the view of French law, the princess has lost her French nationality by settling abroad without expectation of return.

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IV. CONTROVERSIES OF MODERN CONTINENTAL JURISTS.

III. FORCE AS AN ELEMENT OF LAW.

As the name of Von Ihering is not to be found, we believe, in "Men of the Time," or any similar publication in the English language, it may be not quite out of place to say something of the man.

Rud. von Ihering was born at Aurich, Hanover, in 1818, and was educated at the University of Berlin. At that institution he concluded his legal studies at the age of twenty-five years. Two years afterwards, he accepted an appointment as law professor at Basle, and he successively occupied chairs in the Universities of Rostock, Kiel and Giessen. In 1868, he was called to the University of Vienna, and was made aulic and privy councillor of the realm. After the close of the war between France and Prussia, he declined a professorship in the University of Strasbourg, and accepted a similar appointment in the University of Göttingen, a place which he continues to fill, notwithstanding the fact that very brilliant offers have been made to him from Berlin, Leipsic and Heidelberg. He has devoted his life exclusively to the study of law, and is a very voluminous author on subjects of jurisprudence. At home he stands at the head of the jurists of his time and country, and he has received from abroad the most ample testimonials of worth and ability. Of his writings M. Meulenaere, Judge of the Tribunal of First Sentence at Bruges, has said: "The reader will find in them the eminent qualities that distinguish the spirit of the Roman law: concise dialectics, a nervous style, a boldness of view, often compensated by a thrilling divination that captivates the mind of the student."

The Italian Mariano is even more emphatic in eulogy.

"Notwithstanding," he says, "the serious, numerous and continued labors of teaching, which have occupied a great part of his time, Ihering has found time to distinguish himself by his literary activity. If he is esteemed as a professor, he is no less so as an author, for in the latter respect he passes for one of the most learned men of Germany, and no one can say that this reputation is either usurped or exaggerated. By the side of all his qualities as jurisconsult, we perceive in his labors the proof of solid and large general information, and, what is more, of a profoundly philosophical education. One feels that he has been born in Germany, in that classic land of philosophy, where the speculative exigencies of thought have become, and remain, forever a patrimony that is common, almost national; in which all men breathe, move and live,"

In one of his works, intended mostly for students of law,¹ Von Ihering uses certain language, which we reproduce, not only on account of its striking truth, but because it affords a key to his style of thought, and therefore seems to be pertinent to what follows. He says:

"The difficulty in the study of jurisprudence does not consist in the great quantity of the matter, nor in the almost want of attractiveness; but rather in the fact that it demands a faculty of abstraction which minds the best endowed do not, at first, possess in a sufficient degree. There is no study, except perhaps those of mathematics and pure philosophy, which is so difficult in the commencement, and hence so little attractive, as that of jurisprudence. The beginner is suddenly thrust into a world of ideas wholly new, having no contact with those in which he has previously passed his life; it is a new language, which he must acquire through study and patience. He must march with a firm step upon the territory of abstraction, familiarize himself with the ideas of the law, employ them, and handle them, as if they were sensible objects; although he does not yet possess the indispensable instrument for doing so, the faculty of seeing the objects displayed before him; in short, he does not yet pos-

¹ Die Jurisprudenz des täglichen Lebens, etc.

sess the capacity to grasp abstractions. The first care of the instructor ought then to be to give to the student this kind of theoretical intuition ; and he will do so in an assured manner, if, instead of presenting to the novice the abstract idea in its primitive simplicity, he incarnates it in some kind of fact ; if, in the place of vaporous outlines, hardly visible, he presents an abridgment that is concrete and easy to be understood, one that may be retained in a lasting manner."

This method of dealing with legal subjects is characteristic with the author. In search of the most remote and fundamental conceptions, he is careful, at the first possible moment, to imprison them in the concrete. Thus it is, in some sort, that he personifies what to others are mere abstractions.

The little treatise of which we are to make especial mention² has run rapidly through five German editions, with successive augmentations. It has been already translated into the French, Servian, Hungarian, Dutch, modern Greek, Italian, Russian, Bohemian, Illyrian, Danish and Polish languages. It has not, we believe, been translated into English, though, not being founded on any particular system of laws, it might be supposed to be as interesting to English-speaking lawyers as to the lawyers of any other country. But the fact is, that the lawyers of England and of this country are of a more practical turn of mind than the lawyers on the Continent seem to be. They trouble themselves but little with speculations that do not directly lead up to tangible results. Bentham had become exceedingly famous in France when he was utterly unknown in his own country. John Austin drank the bitter hemlock of neglect, and died. This is no doubt one of the effects of our implicit reliance on adjudicated cases ; a reliance that bounds our horizon by fixed limits.

The author wished to overthrow the theory of Savigny, of the gradual and unsolicited self-evolution of the law, as to which he expresses a sharp and decisive dissent. Having already said as much on that subject as seems to be needful, we shall omit so much of Von Ihering's tract as relates to it.

² Der Kampf um's Recht.

The law side of the argument consists in an assault on all of Savigny's positions; but on the philosophical side, the author covertly attacks two philosophers of predominant influence and ability. It may be said in a very general sort of way, that while the philosophy of England and Scotland has constantly run into ethics and theology, that of Germany has just as constantly run into the science of jurisprudence. It would be an appalling work for any one to undertake to examine the many speculations of German philosophy on the subject of law. They have had no practical effect. This may be ascribed to the obtuseness of the average legislator. But the legislator must have a regard to the mental condition of the people by whom the laws are to be enforced, and by whom the laws are to be obeyed; who desire an easier access to the laws than through metaphysical systems that war upon each other, and that centuries of controversy have not been able to mature.

The two systems of philosophy that are most in hostility to the views of Von Ihering are evidently those of Hegel and Stahl, a fact which Mariano, an enthusiastic Hegelian, either does not see, or fails to resent. One of the most lasting controversies concerning the philosophy of Hegel is as to whether it is intelligible or not. The poet Heine, the most spiritual of all his race, who had the advantage of a personal acquaintance with the great philosopher, did not hesitate to assert that Hegel did not understand his own teachings. When Baron Reiffenburg asked Hegel to state his philosophy in a brief outline, the philosopher said: "Sir, it is impossible; especially in French." And that was doubtless the simple truth. Cicero said that he had taught philosophy a new language, meaning the common language of the people of Rome. Hegel taught it to speak a new language, affiliated on the German; but one that had never been heard on sea or land. Various attempts have been made to translate it into common speech, but never with any success. And as an attempt thoroughly to understand the eighteen volumes of his works requires a resolution akin to that of the immortals, the question of his intelligibility is one on which the

suffrages must always be divided. But there are certain thoughts of his that are perfectly intelligible, and they are often so profound in their insight, that when he seems to be obscure, the reader is apt to take the blame on himself, and to let the seeming obscurity pass under the name of the profound.

But there is one fundamental maxim which all his writings doubtless tend to support. It is this: "Whatever exists is reasonable; and whatever is reasonable exists." It follows that if we think anything existing unreasonable, there is also a reason for our thinking so, though thereby we commit an error. It is not possible to see in this anything but fatalism, somewhat curiously expressed. The argument in favor of fatalism is logically unanswerable. It has never been answered except by begging the question. Nothing has been proved by an argument so demonstrative. There is not the slightest flaw or crevice in it. But when we have made it, we do not believe in the conclusion. After all, it lacks the indispensable criterion of all truth, credibility. It may be true; but it is not true for us. What the relationship between Savigny and the fatalists was has already been seen. The difference was probably that which exists between one who asserts a doctrine, and one who asserts conclusions which merely presuppose that doctrine.

But there was another doctrine to be met which is more or less allied with fatalism, though it professes a sharp and uncompromising hostility to fatalism, as being an essentially pagan doctrine. We mean the doctrine of foreordination, that refers every event to the appointment of the Divine Will, in the presence of which every human agency is passive or powerless. Of this doctrine Stahl deserves to be called the great modern apostle. A Jew by birth, he apostatised to Christianity. With the zeal of an apostate, he contends for the exclusion of the Jews from all political power. There is no denying his ability. He was the most stalwart advocate of arbitrary power that despotism has ever enlisted in its service. Beginning with the fall of Adam, he supported its cause by every passage of Scripture, by every event in his-

tory, sacred or profane. To him every nation was a theocracy. Kings were to him the annointed vicegerents of God, the instruments of his favor or of his long-brooding vengeance. Nor was his doctrine at all hard to be understood: it was as explicit as it was fearful. To him the Divine Being was simply an avenging Deity, setting snares and pitfalls for the unwary sinner, laughing scornfully over the premeditated ruin of the human soul. Human tyranny comes in as a natural complement. Republics are nothing but oligarchies of demagogues, having no more legitimate authority than pertains to an unconsecrated priesthood. Our destiny allots to us sorrow, disease and death, and confers on us no greater boon than perpetual slavery. There is no way of avoiding slavery except by incurring still greater evils. He glosses over nothing. He says:

“A king should not bear the name of his people, but that of the nation at whose head God has placed him. The king is neither the first public functionary, nor the agent of the nation: he is the representative of God, and holds his power from God. The people can neither make nor unmake kings. A king is king by the grace of God, and not by the will of the people. His government, it is true, ought to be paternal; but if it is not, the people should support with patience and humility the misfortune of having a king that is unworthy and incapable; for it is the peculiar malediction of temporal existence that humanity is not ruled directly by God himself, as all things are in the eternal existence.”³

This theory, Bluntschli remarks, reminds one of those men who inveigh against lightning-rods and companies of life assurance, as hindering the realization of the providential will. The jurisprudence of Stahl fell on willing ears. He was immensely favored at court, and he was adored by a small but intense circle of zealots who hung the heavens with black, and whose natural virtues had been pretty well killed out by over-cultivation.

Dissent from all these kindred theories on the part of Von Ihering implies a theory of itself. No one could attempt to

³ Die Philosophie des Rechts nach Gesichtlicher Aussicht.

present his views in a few pages without diffidence and hesitation. The matter, which might easily have been expanded into volumes, is already concise, and, at times, even to ambiguity: it cannot be further condensed without mutilation. We shall endeavor to present an outline, knowing it to be imperfect.

The idea of the law is practical, indicating an object; and every idea expressive of a tendency is essentially double, comprising as an antithesis the end and the means. The object sought must be shown, and also the road that leads to it. These are the two questions of which the law affords everywhere a solution. The law is a continual response to this double demand. But however varied the means may be, they are always reduced to a combat against injustice. The idea of law contains an antithesis, which grows out of that idea, and is inseparable from it: combat and peace. Peace is the object of the law; combat the means of obtaining it. It might be objected that aggressiveness and discord are just what the law strives to prevent; but if the law were not aggressive on its side, it would be compelled to yield to the attacks of injustice; so that combativeness is not a strange element in the law, but is rather an integral part of its nature, even a condition of the idea itself.

Every right that is recognized in the world has been acquired by a struggle; every principle of our law now in force had at first to be imposed upon unwilling men; and every right presupposes some one who is ready to defend it. The law is not a logical idea; it is one of force. Justice holds in one hand the scales by which the right is weighed; in the other, the sword by which the right is made to prevail. The sword without the balance is brute force; the balance without the sword is law in its impotence. The law does not truly reign unless the force displayed in holding the sword equals the ability with which the balance is handled.

Law is labor without relaxation, the labor not only of the government, but of each one of the people. Every nation displays incessantly as much painful effort in defending right as it expends in the development of its activity in the do-

mains of economic and intellectual production. Every man who defends his right takes a part in the national labor, and contributes in his measure to the realization of the idea of law in the world. This duty is not imposed on all men in the same proportion. Thousands of individuals behold their lives glide away smoothly, without struggle, between the limits fixed by the law. If we should speak to them of the combativeness of the law, they would not understand it; for the law has been to them only the reign of peace and order. They are like rich heirs, who, having gathered the fruit of the labors of others, deny the proposition that property is labor. The cause of their illusion grows out of the fact that the two senses offered us by property and right may be subjectively decomposed, in such a way that enjoyment and peace may be the lot of one man, and labor and struggle the part of another. This may take place not only between individuals, but also between entire generations. The life of one man is peace; of another, war. So of different periods in national life. We cradle ourselves with the dream of a long season of repose; we even believe in a perpetual peace, until the first cannon shot dissipates our fine visions, and ushers in another generation, succeeding one that has quietly lived in peace, which shall only enjoy on the condition of having merited enjoyment by the rude labor of war. Thus in right, as in property, labor and enjoyment are distributed, and yet their correlation never suffers in the least. If you live in peace and abundance, know that another has had to combat and labor for you. One must recall the Garden of Paradise if he would speak of peace without conflict, enjoyment without labor; for there is nothing known in history that is not the result of painful and continual effort. Ordinarily writers on jurisprudence occupy themselves with the balance of justice; the law does not appear to them as a force, as it really is; but in its rational aspect as a tissue of abstract principles. This way of looking at the question gives to the law a tranquil and mild aspect that is but little in harmony with the bitter reality.

Right may be regarded, in the objective sense, as being

the mass of the law in force, the legal order of life ; and, in the subjective sense, as being, so to speak, the precipitation of the abstract legal rule in the concrete right of the individual. In both of these directions it encounters a resistance that must be overcome. That it requires an exertion on the part of the state to maintain the right needs no proof. It cannot succeed in maintaining legal order except by a continual struggle with anarchy. In this there is nothing spontaneous. Legal principles may undergo an insensible change through the modifying influences of judicial decisions, or of public opinion ; but for that which breaks down legal principles, and establishes new ones in their place, we must look to voluntary activity as exhibited in the statutes. It often happens that an important modification of existing laws can only operate by wounding profoundly existing rights and private interests. There arises at once an opposition, growing out of the instinct of self-preservation, and in the ensuing conflict it will not be the weight of reasons, but the state of the forces actually present, which will decide, and which will often produce the same result as a parallelogram of forces ; that is, the conversion of a straight line into a diagonal. This is the only way to explain why it is that institutions, condemned long ago, survive through ages ; they are not maintained by the *vis inertiae*, but by force of the resistance opposed by the interests connected with their perpetuity.

As the existing law is thus defended by interest, the law of the future makes its way through a contest, lasting often for a century, which attains its greatest vigor when new interests have been clothed with the character of acquired rights. Then there are two parties in the field, each bearing upon its banner the device, "Sacredness of Rights." The one appeals to the sacredness of historic right, the right of the past ; the other to the sacredness of the right which is developing, which continually renews itself, the primordial and eternal right of humanity for the future. This is the conflict of the idea of right with itself ; and for those who have sacrificed in defence of their convictions, all their strength, all their being, who succumb at last under the supreme judgment

of history, the conflict has in it truly something of the tragic. The law is indeed Saturn devouring his children. It cannot renew itself without breaking with its past. It does not grow like the herb of the fields. The sad reality may well convince us of the contrary. There is a continual struggle, an incessant laceration. The time of innocence and simplicity, when the laws fashioned themselves without effort, has never existed, except in the dreams of the past. The first rights acknowledged by men in pre-historic periods could only have secured recognition after a furious struggle. Nor should we complain that this is so. It is because the people do not attain to their rights without trouble, without labor, without exhausting themselves in efforts, without shedding their blood, that there is an intimate bond that binds them to their rights. The young of the stork give it no trouble; they may be carried away by a fox or by a vulture; but who shall tear the child from its mother? Who shall rob a people of institutions and rights that have been purchased by the price of blood? The energy and affection with which a people maintain and defend their rights are measured by the efforts which they have cost.

The concrete right of the individual is never free from liability to attack, and the same thing is true of the rights of communities. Hence results a contest that may be renewed in every sphere of the law, from the lower regions of private law to the higher regions of public and international law. Notwithstanding the difference in the objects of the litigation, the forms and dimensions of the struggle, war, revolt, revolution, lynch law, the cartel of the Middle Ages, the duel of our own private quarrels and the bloodless struggle of the lawsuit, are all scenes of the same drama, the combat for the right. It is an error to see in this only a contention for visible objects; the knight in former times, the plaintiff or defendant to-day, strives for something more than the value of the visible subject of the controversy; in that subject, he defends his right, his honor, his very person.

When the rights of an individual are invaded, there is presented to him a question which he may solve as he deems

best, to wit, whether he will defend himself, resist his adversary, or whether he will abandon the struggle and yield. Whatever the solution may be, he must make a sacrifice; he must sacrifice his right for peace, or he must sacrifice his peace for his right. The question would seem to reduce itself to this: which, in the special case, and according to the determinate condition of the individual, is the sacrifice that is least onerous? For the rich man the object of the litigation is insignificant; but the poor man, for whom it is proportionately important, will prefer to sacrifice his peace. The question of the contest for a right might therefore seem to be a mere matter of calculation, in which one might be supposed to weigh advantages and disadvantages, and to decide accordingly. But in truth this is not the case. Every day we observe that people go to law when the value of the object in litigation bears no relation to the probable sacrifice of trouble, effort and costs involved. When one has lost a franc, he certainly will not give two francs to recover it. How much he will give is a matter to him of pure calculation. We might say that the litigant hopes to gain his suit, and to throw the costs on his adversary. There are persons who will begin a lawsuit, though they know that their triumph will be dearly bought. Often the client will say to his attorney, "I will bring the suit, let it cost what it may." How shall we explain this attitude, which, in the mere point of pecuniary interest, involves an absurdity?

The common answer is, that there is a miserable and diseased mania for lawsuits, a pure love of controversy, an ardent and irresistible desire to injure an adversary, which will be gratified, though at an extravagant expense. But this is a superficial view. Instead of two individuals, let us suppose two nations. One of them has taken possession of a league of worthless land belonging to the other. Shall war be declared? What is a league of sterile soil, in comparison with a war that will cost the lives of thousands of citizens, that will sow sorrow and ruin in the cabin of the poor and the palace of kings, that will swallow up millions of the public treasure and will perhaps threaten the very existence

of the state? One perhaps might give a different counsel in this case from that which he would give to the peasant whose rights have been infringed upon. Every one would feel that a nation that would be silent in such a case of violated right would confirm its own condemnation to death. If it should suffer the square league of territory thus to be taken with impunity, more territory would be taken, until it would have none left; it would cease to be a state; and certainly it would deserve no better fate.

Why should not the same rule be applied in the case of the peasant? He does not begin a lawsuit for the futile value of the object in litigation, but for an ideal reason: the defence of his power, and of his sentiment of right. When he proposes to himself such an end as this, there is no sacrifice, no inconvenience, no painful consequence that will possess any weight in his eyes. He sees in the object to be obtained a recompense for all the means which he must employ. It is not the material interest attached to a sum of money which impels the injured party to demand satisfaction; but it is the moral pain caused by the injustice of which he is made a victim. The important matter for him is not to regain possession of the object in litigation; that object he would give to the next benevolent institution; but what he desires is to enforce the recognition of his right. An interior voice cries aloud to him that it is not permitted to him to yield; that it is not the object of trivial value, but his personality, his sentiment of right, the esteem that he owes to himself, that are at stake.

But certain persons prefer peace to a right that must be purchased with exertion and discomfort. How shall we judge them? Shall we say that it is an affair of taste or temperament; one loves dispute, another peace; and in regard to right, both are equally respectable, for every person has the choice either to abandon his right or to enforce it? This manner of looking at the question, though common enough, is worthy of supreme condemnation, and is contrary to the very essence of right, on which the law is based. If it could ever prevail anywhere, there would be an end of right and

law, for it preaches flight, and cowardly flight, before injustice; whereas the right can only be maintained, can only exist, by a valiant resistance to injustice. Resistance to injustice is a duty of the individual towards himself, for it is a precept of moral existence; it is a duty towards society, for that resistance cannot be crowned with success unless it is general.

Preservation of existence is the supreme law of animated creation. But the physical life is not the whole of man; he must defend his moral existence, of which his rights are a necessary condition. His right is only the sum of the different titles which compose it, in each of which is reflected a particular condition of moral existence, in ownership as well as in marriage, in contracts, as well as in honor; he cannot renounce one without in principle renouncing all. He may be attacked in either one or the other, and that attack he is bound to repel; for it is not sufficient to place these vital conditions under the protection of a right represented in abstract principles; he must descend into the domain of the concrete in order to defend them, and the occasion for doing so is whenever arbitrary power dares to assail them.

Every act of injustice is, however, not an arbitrary action, a revolt against the idea of right. The possessor of any chattel who believes himself to be the owner does not deny in any person the idea of property; on the contrary, he invokes it for himself, and the only question between us is one of ownership. But the thief and the brigand place themselves outside of the legal domain of property. In denying that a chattel belongs to one, they deny at one and the same time the idea of property, and a condition that is essential to the existence of any person; and I am called on to defend myself with all the force at my command. My position as to the possessor in good faith is different. In his case, it is not any sentiment of right, nor any character, nor any peculiarity that should dictate my conduct; for the only matter at stake for me is the value of the object in controversy. I am therefore at perfect liberty to renounce, or to compromise. Such cases would generally be compromised, but for

the fact that parties attribute bad faith to each other, and hence place them in the category of cases where a principle is involved, and there is a personal right to be defended. Talk to them of probable expense and costs, and they will hear nothing; but convince them of mutual good faith, and a compromise is easily effected. With ignorant persons, who are full of passion and distrust, this kind of mental mistake makes of litigiousness, a kind of mania. They are provoked, as by an intentional injury, by a mere claim which the adversary believes to be well founded. The early Roman law expressed in form of legal principles this kind of distrust; for it gave exemplary damages for every injury, whether intentional or not; but in later times that law distinguished between injustice culpable and injustice not culpable. The distinction is important as it affects the question of duty. If any debtor denies his obligation, and impudently asserts that he has never incurred it, it may be my duty to myself and to society to enforce its performance; but there is no reason why I should not compromise with or forgive his heir.

Doubtless these considerations are not present to every litigant. Such a one may resent in a legal manner an injury to himself, and not know that he is performing a duty in doing so. The same person may not know that he has such a thing as lungs, and yet he will feel a pain in his lungs as sensibly as another. So there is a moral pain caused by an injury to one's rights, and a natural instinct demands that one should seek redress, though he may not be able to define his duty in that respect. The intensity of the pain will depend on the character of the injury, and the sensibility of the person injured. Different men possess different degrees of sensibility for different injuries. The readiness with which the peasant will resent an injury to his cattle may be likened to that with which a soldier will resent an attack upon his honor. For every man there is some character of offence that is peculiarly insupportable, while he regards some other offences lightly or with indifference. Nature has thus, by the principle of natural selection, adapted different men for the keeping in force of different portions of the moral law.

Each one, like a soldier on a fortification, works in his place, and in the place for which he is best suited; for a keen resentment is shrewd and persistent in the search for adequate remedies. This sensibility is not the pure result of temperament; for every one may be expected to resent most actively that kind of injury which most directly and fatally attacks the chief ends that he proposes to himself in life. To the merchant his commercial credit is beyond price; to the man of strong domestic affections, the ties which bind him to his family supply the fund for a most delicate and profound sensibility. The penal code, with its various and graduated punishments for various offences, furnishes a perfect thermometer for the sensibility of the state. It will be found to vary in different states, and in the same state at different periods.

If one invites the law for the protection of his chattel, it is, or may well be, that the chattel is something more than the representative of a certain value. The historic source and the moral justification of property is labor; not only that of the hands, but also that of the mind—of talent. Not only the workman, but his heir equally, is entitled to the fruits of this labor; for the right of succession is a necessary and indispensable consequence of the principle of ownership. It is only the continual connection of labor with property that can preserve the latter in its stainless purity. When this connection is weakened or severed, by a diversion into the paths of easy acquisition, destitute of labor, the current becomes troubled until it is lost in the slime of speculation, and fraudulent stock jobbing, and property loses every trace of its primitive nobility. When this is the case, it has been robbed of the last vestige of the moral idea. It is evident that moral duty can no longer be called to its defence; the sense of property, as understood by the man who gains his bread by the sweat of his brow, no longer exists. What is very sad in all this is, that opinions and habitudes engendered by such doctrines extend gradually into circles into which they could not be spontaneously developed. Even in the cabin of the poor, the influence exercised by millions gained by specula-

tion is sensibly felt ; and those who in its absence would have found by experience the happiness of toil, unwillingly support, beneath the enervating weight of an impure atmosphere, the burden of labor as a malediction. Hence, communism grows up, and is nourished by a notion of property that is wholly false.

If we truly perceive the nobility of property, as the visible trophy of honest labor, we shall also perceive that its defence is also clothed with nobility and dignity. Here, also, is labor and toil of another kind, but no less honorable or imperative. The coward who flees from the field of battle saves what others lose, life ; but he saves it at the price of honor. It is only the resistance that others continue to offer that protects society and himself from the consequences of his act ; if they all thought as he thinks, their common ruin would be certain. So it is with the cowardly abandonment of right. As an isolated act, it is without consequence ; but if it should become a general maxim of conduct, the rights of men would be lost. It is not only individuals that are called on to take part in the struggle ; when the state is organized, the public power participates in it largely, in bringing before the courts every grave attack made on the rights of an individual, his life, his person, his property ; so that the private citizen finds himself relieved, in advance, of the most painful part of the duty. But it is not sufficient that the police and public officials keep watch that human rights shall not be sacrificed, for private injuries are abandoned to individual pursuit, in the confidence that all the world will not be controlled by the policy of the coward, and that even he will place himself among the combatants, when he believes that the value of the object merits the sacrifice of his comfort. In so far as he fails to defend his right, he betrays his own security, and that of his fellow-men, and just to that extent the law, on which all men must rely for moral and material support, perishes and falls into ruin. The maxim of submission is applied everywhere to the law with the same result ; and it is not possible to consider it as being just because its fatal consequences are accidentally paralyzed by the influence of other beneficial and counteracting circumstances.

A right is only an interest protected by the law. If chance has placed me in possession of an object, I may be deprived of it without injury to my person; for it is not chance, but my will, that establishes a bond between it and me; and only because of the value of the labor which it has cost me or another is it a part of my labor and of my past, or the labor and the past of another which I possess and defend in it. In appropriating it, I have placed on it the seal of my person; whoever attacks it attacks me, for my property is myself. Property is only the periphery of the person extended to a thing. This connection of a right with the person confers on every right, of whatever nature, an immeasurable and ideal value, which may be set over against the value that is purely real. It is this intimate relationship that creates in the defence of a right that devotion and energy which are so often displayed. This ideal conception is not a privilege reserved for select classes: it is possible for all; for the rude man as well as for the cultivated; for the richest and the poorest; for savage tribes and for civilized nations; and this proves to us that this ideal point of view has its source in the most intimate nature of right; it shows the sound condition of the legal sentiment. Law, which seems, on the one hand, to consign man exclusively into the base regions of egotism and self interest, elevates him, on the other, to an ideal height, where all calculations, all subtleties, are forgotten, in order that he may sacrifice himself purely and simply in defence of an idea. Law, which on the one side is prose, becomes poetry in the contest for an idea; for the combat for a right is in truth the poetry of character.

How is this prodigy produced? Neither by knowledge, nor by education; but by the simple sentiment of suffering. Suffering is the cry of distress, the appeal for aid by threatened Nature; and this is true not only of the physical organism, but also of the moral being. The pathology of the legal sentiment is for the legist, the philosopher of the law, what the pathology of the human body is for the physician, revealing truly the secret of the whole of the law. The suffering of the man whose rights are invaded is the spontaneous and instinctive avowal, torn from him, as to what the law is to

him; to him personally, and to every individual of his class. The true nature and real importance of the law reveal themselves more completely in such a moment, and under the form of moral affection, than during an age of peaceful enjoyment. He who has not personally experienced that pain, nor has been the witness of it in others, knows not what the law is, though he may have the whole of the *corpus juris* in his head. Consciousness of right, legal persuasion, are only abstractions of the science that are not understood of the people; the force of the law, like that of love, reposes in sentiment, and reason cannot replace the sentiment when it is once lost. And as love sometimes reveals itself wholly in a single moment, so it sometimes happens with the legal sentiment; when it has not been wounded, it is commonly unconscious, and knows not that of which it is capable; but injustice is the torture that makes it speak, that brings out the truth in its full force, and in all of its brightness. Right is the condition of the moral existence of the person, and to defend it is to defend that moral existence. It is not only the pain, but rather the violence and tenacity with which the sentiment of right reacts against any injury, that is the touchstone of its health. The degree of pain experienced by the person wounded is simply an index of the value attached to the thing about to be lost. But to feel the pain without taking to heart the warning which it sounds for the removal of the danger is only a negation of the sentiment of right, which circumstances may excuse in a given case, but which, in the long run, cannot fail to produce fatal consequences to the sentiment itself. Action is, indeed, of the nature of the legal sentiment, which can only exist on the condition of acting: if it acts not, it becomes blunted, gradually expires, until it almost wholly loses its sensitive faculty. The amount of the irritability and of the action are the double criterion by which it may be known whether the sentiment of right is sound or not.

The force of the resistance is a pure matter of character. The attitude of a man or of a people, in the presence of an attack on their rights, is the surest test by which they can

be judged. If we understand by character the personality complete and entire which maintains itself, depends only on itself, certainly there is no better occasion for the display of that noble quality than in the presence of arbitrary power, which attacks at the same time justice and the person. The forms under which the reaction caused by an assault on the legal sentiment, or on that of personality, whether, under the influence of suffering, it translates itself in a wild and passionate manner, or whether it manifests itself in a resistance full of discipline and tenacity, will not serve in any sense to determine the force of the sentiment of right. The form is more or less a question of education and temperament; but a firm, resolute and persistent resistance yields in nothing to a violent and passionate reaction. It would be deplorable if the case were otherwise. It would be to say that the sentiment of right dies down in individuals and in nations in proportion to their progress in intellectual development. A glance at history, or at actual life, will convince us of the contrary. Neither is it in the antithesis of riches and poverty that we find the solution. However different may be the economic measure in which the rich and the poor will judge of the same thing, that difference is not to be found in the resistance made by them in case of an attack on property. It is not a question of the material value of the object, but it is one of the ideal value of the right, and consequently of the energy of the legal sentiment relative to property; not the greater or less quantity of riches, but the force of the legal sentiment, that will decide. The best proof of this is to be found in the English people. Their riches have in nowise affected their sentiment of right, and often on the Continent we have occasion to observe the energy with which this sentiment is manifested by them in simple questions of property. The type of the English traveller, who will not consent to be the victim of the deceit of inn-keepers and coachmen, who opposes to them a manly resistance, as if it were no less a question than a defence of all the rights of Old England, is well known. The people laugh at him, without understanding him. It were better for them if they understood him better. In the

few francs that he defends is England, and he so conducts himself as to preserve her traditions, and to render it impossible that anyone shall cheat him with impunity. The Austrian, under similar circumstances, will pay the sum that is unjustly demanded; he recoils before ridicule and the inquietude of a dispute. And in the franc that the one pays and the other refuses is the similar history of the political development and social life of the two countries.

The common theory is that a concrete right can only grow out of the re-union of the conditions that the principles of abstract right attach to its existence. This theory brings exclusively to view the dependence of the concrete right on the abstract right, and says absolutely nothing of the dependence that exists in an inverse sense. The concrete renders to the abstract right the life and force which it receives from it. It is in the nature of right that it should realize itself practically. A legal principle that has never gone into effect, or which has lost its force, does not deserve the name. It is a worn-out or superfluous wheel in the mechanism of the law, which may be removed without damaging its operations. This truth applies to every part of the law, public and private. In the Roman law, a law long disused was considered as abrogated. While the practical realization of public and penal law is assured by being imposed as a duty on public functionaries, that of private law is presented to the people in the form of rights, and is completely abandoned to their free initiative, their voluntary activity. Public law will be realized if the functionaries perform their duty; private law, if individuals enforce their rights. Private law does not exist in reality, and has no practical force except in so far as private individuals make good their concrete rights. If these owe their existence to the law, the law also derives its existence from them. The relation between rights abstract and concrete recalls the circulation of the blood, which is expelled from the heart and returns to it.

It may be said that if the injured party will put up with the offence, it is a matter that concerns himself alone. If a thousand soldiers are in line, it may be that the defection of one

will not be sensibly felt; yet if a hundred abandon the standard, the condition of those who remain faithful will be rendered critical; for the brunt of the battle will fall on them. The same thing is true in regard to private right, the combat of right against injustice, the common battle of the whole community, in which all the members of the community should stand firmly together. To desert in such a case is also to betray the common cause; for it is to increase the force of the enemy in augmenting their courage and audacity. When arbitrary power and illegality lift up impudently their heads, we may know by that sign that those who have been called to defend the law have not fulfilled their duty. Each one is charged in his position with the defence of the law as regards his private right. The concrete right which he possesses is only an authority which he holds from the state to combat for the law in respect of his own interests, to enter into the lists to resist injustice. He combats for the general right, for the maintenance of law, when he defends his personal right in the limited space of his personal activity. The interest and consequences of his action extend beyond the fact, beyond himself. The general advantage which results is not only the ideal interest, that the authority and majesty of the law are protected, but also the other benefit, which is very real, supremely practical, comprehended and appreciated by all; that is to say, that one defends and assures the established order of social relations. Suppose that the master dare not recall his domestics to their duty; the creditor may not have execution against his debtor; that the public may not attach in commerce a minute importance to weights and charges—certainly then the authority of the law would be in danger. The consequences would be unfortunate, and capital would withdraw itself to other lands. When such a state of things exists, the fate of those who have the courage to see to it that the laws are enforced is truly that of a martyr; their energetic and ardent sense of right is the cause of their unhappiness. Abandoned by all those who should be their natural allies, they remain completely alone in the presence of arbitrary power, which the

apathy and cowardice of others render more and more audacious; and if they succeed at last in purchasing the satisfaction of having remained faithful at an exorbitant price, they receive taunts and ridicule instead of gratitude. The responsibility for this state of things rests, not with those who violate the law, but with those who have not the courage to defend it. Taking man as he is, there is no doubt but that the certainty of meeting a firm and resolute resistance will be more powerful to prevent injustice than a simple prohibition, whose only practical force consists in nothing more in reality than a precept of the moral law.

Whoever defends his right defends the law, and the law is the indispensable order of the public weal. If the state has the right to call on the citizen to make battle against the foreign enemy, if it may force him to sacrifice everything, even to give his life, for the public safety, why has it not the same right where it is attacked by an internal enemy which threatens its existence to an equal extent? And if a cowardly flight in the one case is treason to the common cause, why is it not treason in the other? In order that right and justice should flourish in a country, it is not enough that the judge should always be ready to ascend his seat, and that the police should be ready to send out its agents; it is also necessary that each citizen should contribute his part in the great work; for every man is charged with the duty of breaking the head of the hydra of arbitrary power and illegality, whenever it is lifted up.

It is useless to say how, in this view, the obligation of each individual to enforce his rights is ennobled. In its fulfillment, he renders to the law the service which he receives from it, and co-operates in a great national work. It is of no importance whether the question appears to him in one light instead of another; for there is this that is great and elevated in the moral law: that it may count not alone on the services of those who comprehend it, but that it possesses many means of all kinds by which it causes those to act who have no intelligent notion of its precepts. Thus, in order to constrain man to marriage, it causes to act, with one, the noblest

spring of human action; with another, the gross appetites of sense; with another, the love of ease; and with still another, mere cupidity; but however it may be, they all marry. Thus it should be in the combat for the right; and it is of no importance whether it is interest, or the suffering caused by injury, or the proper conception of right, that impels men to enter the lists; in any event, they give each other the hand, and labor in a common cause, the protection of law against arbitrary action.

It may be said that no one ever begins a lawsuit from a mere ideal sentiment of right; but every man who is indignant, and experiences a moral anger at the sight of right oppressed, possesses that sentiment without doubt. A selfish motive may mingle itself with the painful feeling provoked by a personal injury; but the pain itself has its cause in the power of the moral idea over the human heart. It is the energy of the moral nature that protests against injustice, the finest and most lofty testimony which the legal sentiment can give of itself; a moral phenomenon, as instructive for the study of the philosopher as for the imagination of the poet. There is no other affection that can operate in man so suddenly a radical transformation; it can elevate the most gentle and conciliatory natures to a state of passion otherwise unknown; which fact evinces that the noblest part of their nature has been reached, and that the most delicate fibres of their existence have been touched. It is the phenomenon of the storm in the moral world. It is grand and majestic by its rapidity, its suddenness, the power of its explosion, by the energy of its moral force; which resembles a hurricane, that overturns all before it, and then becomes calm and beneficent, producing for the individual, and for all, a moral purification of the air inhaled by the soul. But if the limited force of the individual is broken against institutions that accord to injustice the protection that is refused to the right, the storm recoils upon its author; his wounded legal sentiment makes of him a criminal, or he furnishes the not less tragical spectacle of a man who bears constantly in his heart the sting of injustice, and who loses, little by little, his moral life and all belief in law and right.

A personal right cannot be sacrificed without a corresponding sacrifice of the law; for there is a complete solidarity between the concrete right and the law. This fact is not so profoundly concealed that the selfish man, who is incapable of any elevated idea, cannot perceive it; on the contrary, he probably comprehends it better than another, for it is to his interest to associate the state with himself in his struggle. Thus Shylock asserts that if he receive not his pound of flesh, it will be a shame to the laws of Venice. The poet speaks with more than the wisdom of a philosopher.

A nation is definitively only the sum of the individuals who compose it; it feels, thinks and acts as its isolated members feel, think and act. If the sentiment of right in individuals is blunted, cowardly, apathetic, as regards private right; if the obstacles opposed to them by unjust laws or evil institutions do not permit them to develop their strength freely, in all its force; if it is persecuted, when it should be protected and encouraged; and if, in consequence, they accustom themselves to suffer injustice, to consider it a state of things that cannot be changed;—it is impossible to believe that men whose legal sentiment is thus enchained, thus apathetic, thus paralyzed, will suddenly wake up, will violently feel and react with energy when there is a legal injury that attacks, not the individual, but the nation at large; when the question is one of an attempt against the political liberty of a people, the appropriation of territory, the overthrow of a constitution. Whoever is not in the habit of defending courageously his personal right will not feel himself impelled to sacrifice his property and his life for the public safety. The sentiment of right as educated by the paltry affairs of individuals will make up the moral capital of which the state will have need in matters of national moment. It is in the energy of the legal sentiment of the individual that the force of a nation resides; and this is the surest guaranty of national defence against all assaults, internal or external.

Existing systems of law seem to be constructed on the false theory that men should be discouraged from defending their rights. The law measures out its redress with a niggard

hand, and its retributions are graduated by a grossly materialistic standard. The injured party receives the value of what he has lost by the injustice of another; there is no compensation for his injured sense of right; he pays his own charges and expenses; the loss arising from the illegal act is shrewdly divided between the litigants; the law favors the debtor, and teaches public sentiment to sympathize with the defendant; the tendency of all of which things is to weaken the legal sentiment among the people, to inculcate in them the doctrine of cowardly submission. By the early Roman law, the successful party in a suit received always something more than the value of the object in controversy; but when what are called humanitarian views began to prevail, the law underwent a change, which recommended tacitly that men should compromise with injustice, apparently in order that injustice might not be wholly killed out.

In our own time, Herbart has discovered the foundation of law in this æsthetic cause: aversion to conflict; as if the law were not itself a prepared and organized means for conflict. So far from repulsing the combat for the right, morals require it as a duty. The element of contest and struggle which Herbart strives to expel from the idea of law is rather an integral and inseparable part of its nature. To do battle is the eternal work of the law. If it is true to say, "Thou shalt eat thy bread by the sweat of thy brow," it is no less true to add, "Only by conflict shalt thou obtain thy right." The moment that the law ceases from the combat, that moment it sacrifices itself.

U. M. ROSE.

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V. RIGHT OF ACTION AGAINST RECEIVERS OF OTHER COURTS.

No branch of equity jurisprudence has developed more rapidly under the decisions of American courts during the past three years than has the law of Receivers. The careful student of our jurisprudence during that time can not have failed to observe this rapid growth, and to note how the courts, by successive and rapidly multiplying decisions, have steadily shaped and adjusted the law upon this subject to the existing state of society and the imperative needs of the hour. Nor will such student have failed to trace this rapid growth to its true source. Beginning with the financial embarrassments which found their culmination in the panic of September, 1873, and the consequent insolvency of large numbers of individual, corporate and partnership debtors, he will have observed the rapid increase of applications for the aid of the courts by receivers, and the liberal exercise of their extraordinary jurisdiction for the protection of judgment-creditors, bondholders and mortgagees. An extended discussion of the increase in this branch of practice, both in its legal and economical aspects, would afford an instructive study. It is only proposed, however, to discuss within the limits of a magazine article, the present condition of the authorities upon one branch, and that by no means an unimportant one, of the law of receivers, as well as to indicate the tendency of the courts toward a better and more tenable doctrine than now prevails. The topic proposed is the right to sue receivers in courts other than those by which they are appointed.

It is undoubtedly true that the present weight of authority is averse to the exercise of any right of action against a receiver other than that from which he derives his appointment,

and to which alone he is amenable. Deriving their notions of the sanctity of the receiver's office and functions from English chancery, courts of equity in this country have almost uniformly denied any right of action against their receivers, unless leave of court be first had for that purpose. Treating the receiver as the officer of the court, deriving his functions solely from that source, and regarding his possession only as that of the court, they have refused to recognize the right of creditors to institute actions against such officers without permission from the appointing power.¹ And thus, virtually, they have denied any right of action against their receivers in other courts, since no court would consent that its jurisdiction over a party defendant should be dependent upon the volition of another tribunal. To such an extent has the doctrine been carried by the English and Irish courts of chancery, that the preventive aid of an injunction has been frequently granted to restrain the prosecution of actions against their receivers when permission to sue had not first been obtained.² And it is the doctrine of the Irish chancery that a suitor who is proceeding to assert his claim to property held by a receiver, by an action at law, without leave of court to sue, may be enjoined by the receiver from prosecuting such action, regardless of however clear his rights may appear, or of whether he was apprised of the receivership at the time of bringing his suit.³ And the fact that the plaintiff in the action is exercising a chartered right or franchise, as in the case of a railway company condemning land for the use of its road, would seem to afford no greater right of action than in other cases, since such a company has been enjoined *ex parte* from proceeding with an action to condemn lands

¹ Noe v. Gibson, 7 Paige, 513; Taylor v. Baldwin, 14 Ab. Pr. 166; De-Groot v. Jay, 30 Barb. 484; s. c. 9 Ab. Pr. 364; Miller v. Loeb, 64 Barb. 454; Randfield v. Randfield, 5 De G., F. & J. 766; reversing s. c. 1 Dr. Sm. 310. And see observations of the court in Wiswall v. Sampson, 14 How. 52. See also Evelyn v. Lewis, 3 Hare, 472; Tink v. Rundle, 10 Beav. 318; *In re Persse*, 8 Ir. Eq. 111; Parr v. Bell, 9 Ir. Eq. 55.

² Evelyn v. Lewis, 3 Hare, 472; Tink v. Rundle, 10 Beav. 318; *In re Persse*, 8 Ir. Eq. 111; Parr v. Bell, 9 Ir. Eq. 55.

³ Evelyn v. Lewis, 3 Hare, 472.

when the court of equity had not first been resorted to for leave to proceed.⁴

In this country the sanctity of the receiver's office has less frequently been protected by injunction, but resort has usually been had to proceedings for contempt against the offending suitor. And it is held that one who brings an action against a receiver in another court, without having obtained permission from the court appointing him, is guilty of a contempt of that tribunal, and may be punished accordingly.⁵ The reason for the rule is found, if at all, in the necessity of protecting receivers against unnecessary and oppressive litigation, as well as in the desirability of compelling all claimants against the fund or property in a receiver's hands to assert their demands by motion, or otherwise, in the proceeding in which he was appointed, thus administering complete justice to all claimants in one and the same proceeding.⁶ And it cannot be denied that courts of equity have usually been exceedingly liberal in granting permission to persons asserting a right of action against their receivers, either to bring their action against the receiver in the court by which he was appointed, or to come in and be examined *pro interesse suo*, in the same action in which the receivership originated.

Such, in brief, may be regarded as the present state of the law upon the topic under discussion. In as far as it prohibits any interference with the actual possession by the receiver of property entrusted to him by the court, it is not proposed to question its correctness, either in point of authority, or as regards the principles upon which it is founded. Indeed, it is cheerfully conceded that the actual custody or control of a receiver over the property or fund in litigation should seldom, if ever, be distributed without the judicial sanction of the court to which he owes his authority. The receiver's possession being that of the court, and the prop-

⁴ Tink v. Rundle, 10 Beav. 318.

⁵ Taylor v. Baldwin, 14 Ab. Pr. 166; DeGroot v. Jay, 30 Barb. 483; ⁵ C. 9 Ab. Pr. 364.

⁶ See observations of the court in DeGroot v. Jay, 30 Barb. 484.

erty or fund being held *in gremio legis*, for the benefit of whomsoever may ultimately be determined entitled thereto, every consideration of economy, of the prevention of vexatious litigation and conflicts of jurisdiction would indicate the importance of thus protecting his exclusive possession by an inflexible rule of law. And such is the state of the authorities.⁷ Of their correctness no question is made and no doubt entertained. It is only the purpose of this article to show that the rule as construed to extend immunity to receivers from actions in courts other than of their appointment is at once illogical and unsupported by legal reasoning.

The effect of thus absolving receivers from liability to actions in foreign courts⁸ is to afford them privileges and immunities which the law extends to no other class of judicial or ministerial officers. Their status as receivers and their right to exercise the functions of their office within the jurisdiction of other courts being generally conceded, either upon principles of comity or of strict right, they are yet absolved from any corresponding obligation, and protected from any legal liability on account of their official acts in any forum other than that by which they are appointed. Surely such a state of things may justly be regarded as anomalous under our system of government, with the uniform balance which it seeks to preserve between rights and their corresponding obligations. It is true, the receiver is the officer of the court appointing him, and so strongly has the identity between the court and its officer been asserted that he has been termed "the hand of the court."⁹ But with equal propriety and in an equal degree may a sheriff be spoken of as an officer of the court; indeed, the likeness

⁷ *Wiswall v. Sampson*, 14 How. 52; *Robinson v. Atlantic & Great Western R. Co.*, 66 Pa. St. 160; *Skinner v. Maxwell*, 68 N. C. 400; *Vermont & Canada R. Co. v. Vermont Central R. Co.*, 46 Vt. 792; *Evelyn v. Lewis*, 3 Hare, 472; *Angel v. Smith*, 9 Ves. 335; *Russell v. East Anglian R. Co.*, 3 Mac. & G. 104; *Brooks v. Greathed*, 1 Jac. & W. 176; *Ames v. Trustees of Birkenhead Docks*, 20 Beav. 332.

⁸ I use the term "foreign" merely in distinction from the court by which the receiver is appointed.

⁹ *Ellicott v. Warford*, 4 Md. 80.

between the functions of sheriff and receiver is a striking one, and has been the subject of judicial comment. The one is the executive officer of a court of equity, the other of a court of law; the fund in possession in either case being in the custody of the law; the principal difference being that the receiver's functions are more comprehensive than those of the sheriff, since he is usually required to pay all demands upon the fund in his possession, *pro rata*, while the sheriff is required only to pay the debt mentioned in the execution.¹⁰ And the doctrine that a sheriff or marshal may be sued only in the court whose officer he is, only by its permission, would be simply preposterous. So in the case of a master in chancery, or the clerk of a court, each of whom is as distinctively the officer of his court as is a receiver, the liability of such officer to be sued in a foreign court, without permission obtained from the tribunal whose representative he is, is too plain to admit of question. So, too, in the case of administrators, executors and guardians, who, while occupying fiduciary relation toward the objects of their trust, are yet in a certain sense officers of the court, their liability to actions in any court of competent jurisdiction, and without the consent of the court appointing them, has never been questioned. Can any sufficient reason be assigned, either in logic or in morals, why a receiver should be absolved from obligations and liabilities which pertain to all other judicial officers?

Cases will readily occur in which this exemption of the receiver from liability to an action in other tribunals may work great hardship. The case which is most readily suggested is that of a receiver over a railway corporation, appointed by the courts of one state and exercising his functions and operating the road in other and different states. If the rule be rigidly applied, that the receiver can only be sued in and by leave of the court appointing him, the contract relations of every person dealing with the receiver in other states, as well as all rights of action against him for damages

¹⁰ See observations of Blodgett, J., *In re Merchants' Insurance Co.*, 3 Bissell, 162.

occurring through the negligence of his employees, must be determined in one forum only, that of the receiver's appointment.

It is gratifying to observe that the hardship of enforcing such a rule has recently led the Supreme Court of Massachusetts to a plain departure from it, in a decision which may be regarded as containing the germ of the future doctrine upon this subject.¹¹ The action was brought in Massachusetts, against receivers of the Vermont Central Railway, appointed by the court of chancery of Vermont, to recover the value of certain freight destroyed by fire upon the line of defendant's road while *in transitu*. It had been previously held by the Supreme Court of Vermont that the receivers in question, having control of the railway and holding themselves out as common carriers, were liable to an action at law for a breach of their duty as such carriers, and that it was no defence to such action that they were operating the road as receivers under the appointment of the court of chancery. Citing this decision as fixing the liability of the receivers as carriers in the state of their appointment, the Supreme Court of Massachusetts sustained the right of action against the receivers there, in these words: "It is impossible for the courts of this commonwealth to accord to these defendants an exemption from the ordinary common law liabilities of common carriers, more extensive than they are allowed in the state in which they were appointed receivers, and in which the accident occurred. Under these circumstances the ordinary rule for which the defendants contend, that receivers are amendable solely to the court by which they are appointed, is inapplicable."

Still more advanced ground had previously been taken by the Supreme Court of Wisconsin, which, while recognizing the general rule that the receiver's possession of property was not to be disturbed without leave of the court appointing him, lays down the doctrine in an exceedingly clear and well reasoned opinion, that an action may be prosecuted to judgment against a receiver, in a court other than that by

¹¹ Paige v. Smith, 99 Mass. 395.

which he was appointed, and without permission of that tribunal.¹² Defendant, a receiver over a railway, appointed by the United States court, was sued in the State court for injuries occasioned to plaintiff by the alleged negligence of receiver's agents and servants in running their cars. The court below was asked to instruct the jury, that unless they should find that plaintiff had leave from the Federal court to bring the action, he could not recover, which instruction was refused. Upon appeal such refusal was held proper. And it was clearly pointed out that the rule denying the right to interfere with the receiver's possession without leave, if applied to the extent of denying a right of action in the State courts against a receiver of a Federal court, would result in drawing into the Federal tribunals, not only the adjudications of all actions respecting title to property held by their receivers, but all actions for the non-performance of their contracts. It was shown that receivers of the Federal courts, while operating railways, would necessarily make thousands of contracts for the transportation of freight and passengers, and that they were liable to cause damage to citizens by the negligence of their employees in conducting their vast business; and yet, upon the doctrine then contended for, all litigation upon these multiplied causes of action, although in many cases only between citizens of the same state, would be drawn into the Federal courts, and the State courts would be stripped of all jurisdiction, except at the pleasure of the Federal tribunal. "Such results of the ruling of the Federal courts," say the court, Mr. Justice Paine, "would certainly furnish a very striking illustration of the maxim, *boni judicis est ampliare jurisdictionem*. And it would be small respect to their example if the State courts should hasten to abdicate their jurisdiction over so great a class of legal actions, until it is established that they are bound to do so. Such a rule cannot be held to be established; but the jurisdiction of the State court remains unimpaired, subject to the power of courts of equity to restrain the parties from proceeding at law, upon proper grounds."

¹² Kinney v. Crocker, 18 Wis. 74.

Of course in an ideal state of society, where justice is administered in primitive purity and the hazards of judicial oppression are reduced to their lowest terms, the evils so graphically pointed out by Mr. Justice Paine would excite but little apprehension. But, as practical lawyers, we must deal with existing things. And the recent legislation of Congress enlarging the jurisdiction of the Federal courts, as well as the extraordinary decisions of many of those courts, stretching their jurisdiction to the utmost possible limits, may well excite a feeling of apprehension in the minds of the profession at the rapid encroachments of the Federal upon the State judiciary. It is to be hoped that the authorities upon the subject under discussion are in a transition stage, and that the doctrine already prevailing in Wisconsin and Massachusetts may be speedily and firmly established as the law of the land; and that claimants against receivers may, like all other suitors, have the poor privilege of selecting their own forum.

JAMES L. HIGH.

CHICAGO.

VI. THE REPORTERS AND TEXT-WRITERS.

Abbott on Shipping. "The book came out in the year 1802, dedicated (by permission) to the man who had suggested the subject to him,—now become Lord Chancellor Eldon. Its success was complete. Not only was it loudly praised by all the judges, but by all the city attorneys, and, ever after, the author was employed in almost all the charter-party policy and other mercantile causes tried at Guildhall. Nay, the fame of the book soon crossed the Atlantic, although it was for some time ascribed to another; for, as I have heard the true author relate with much glee, the first edition, reprinted at New York, was announced in the title-page to be by 'The Right Honorable Charles Abbott, Speaker in the House of Commons, in England.' This was his distinguished namesake, Lord Colchester, who had been at the bar, and who was complimented by the American editor for employing his time so usefully during the recess of Parliament." Lord Campbell, *Lives of the Chief Justices*, Vol. IV, p. 338, 3d Ed.

"The first edition of Abbott, in 1802, was a beautiful model of conciseness and simplicity," wrote Chancellor Kent. 3 Comm. 250, note. The fifth edition was the last published in the lifetime of the author. Blackburn, J., in *Cole v. Northwestern Bank*, 44 L. J. Q. B. 235.

Abridgments. "It is extremely important, where citations are made from the Year Books in the Abridgments, to look at the cases themselves from which the *dicta* are imported; for I have often found that a reference to the original case gives a very different meaning to the passage cited." Lord Ellenborough, C. J., in *Burdett v. Abbot*, 14 East, 155.

Archbold (John Frederick). A Digest of the Law Relative to Pleading and Evidence in Actions Real, Personal and Mixed.

In a copy of this book now in the possession of the writer, is this note in MS. "This work was highly recommended to me by the late Chancellor Kent, in December, 1824." It is a first-class book.

Assizes. Liver des Assises et Plees del Corone, moves et dependauntz devaunt les Justices, si bien en lour circuitz come cylours, en temps le Roy Edwarde le tierce [with preface and table by John Rastell.] Folio. London in ædibus R. Fottcli, 1580.

On the fly-leaf of a copy is the following note by Chief Justice Lee: "Mem. Nov. 1714. I was informed by Mr. Whitaker and Mr. Jackson, upon discourse had with them, that this is the best book in the law in cases of Crown Law."

Authorities. "The comparative weight of credit of authorities, where they conflict, is a matter of professional science, which is not regulated by any determinate rules." First Report of the Eng. Crim. Law. Comm. p. 18.

Bacon's Abridgment. "It is well known that Bacon's Abridgment was compiled from the MSS. of Chief Baron Gilbert." Blackburn, J., in *The Queen v. Ritson*, L. R. 1 C. C. 204. "In Viner's Abridgment, Connusance of Pleas, C. pl. 3, in the margin, it is quoted as Gilbert's New Abridgment. The first edition was published in 1736." Bovill, C. J., L. R. 5 C. P. 170.

Beavan's Reports. "Now I must say, with regard to *Madison v. Pye*, 32 Beav. 658, that I think it is a pity that cases which are to be reported at all should be reported in the manner that is." Malins, V. C., in *Scott v. Cumberland*, 44 L. J. Chanc. 226, 228.

Bills of Exchange, Specimens of a Digest of the Law of, by Mr. McLeod. "A law tract, printed, we believe, as a report to the government, but which, from its research and ability, deserves to be produced in a form calculated to ensure a wider circulation." Cockburn, C. J., in *Goodwin v. Robarts*, 44 L. J. Exch. 162.

Bracton.—Fleta. "The law books of Bracton and Fleta are the ancient law of the land extending to all cases. * * * These law books are so strong that there has been no way

thought of to evade them but by denying the authority of them, and calling it Civil Law. But I own I am not a little surprised that these books should be denied for law, when in my little experience I have known them quoted, almost in every argument, where pains have been taken if any thing could be found in those books to the question in hand, and I have never known them denied for law but when some statute or usage time out of mind has altered them." Fortescue Aland, Baron. Fortescue, p. 419, A. D. 1717.

Brady (John). Clavis Calendaria. Third Ed. 2 Vols. 8vo. London, 1815. "Especially to students in divinity and law, it will be an invaluable acquisition." "Replete with learning and anecdote." These just criticisms on really meritorious volumes are quoted in Allibone's Dictionary.

Brown's Chancery Reports. "The singular inaccuracy of Mr. Brown as a reporter." The Law Magazine, Vol. xx, p. 62.

Campbell's Reports. "Whoever looks through Campbell's Reports will be greatly surprised to see, among such an immense number of questions, many of them of the most important kind, which come before that noble and learned judge [Lord Ellenborough, C. J.], not that there are mistakes, but that he is in by far the most of the causes so wonderfully right beyond the proportion of any other judges." Mansfield, C. J., in *Fentum v. Pocock*, 5 Taunt. 195.

Carthew's Reports. "The judges who concurred in this opinion paid very little regard to the resolution reported by Carthew; not only for the reasons insisted on by the counsel for the Crown, but because, as no other printed report of that time taketh any notice of this resolution or not; especially since Baron Clarke informed the court that he hath a MS. report of the late Lord Chief Justice Eyre of the case of *The King v. Perkins*, in which Carthew supposeth Holt to have reported this resolution." Foster's Crown Law, 27, 28.

Cases Taken and Adjudged. "Of this book," writes Mr. Wallace, "I had not heard until reading Lord Campbell's *Lives of the Chancellors*, Vol. III, p. 416. It is there spoken of as reporting in a bad and most unsatisfactory manner a number of cases by Lord Nottingham, and is described as

‘An anonymous 8vo. volume, dated 1694, and entitled Reports of Cases taken and adjudged in the Court of Chancery, from the 20th year of Charles II to the 1st of William and Mary.’ I sent to London, in 1845, for the book, and received for answer that it was ‘very scarce and had not been met with for some years.’” Mr. Wallace then proceeds, without having seen the book, to conjecture that it is in fact the form in which the first edition of the second part of “Reports in Chancery” appeared in 1694, and is a continuation of the first part of “Reports in Chancery” which was published in 1693. And he is right. Both volumes are in the possession of the writer. “Cases taken and Adjudged” contains the same cases now found in the folio edition of 1736 of “Reports in Chancery,” a number of which, of course, were decided by Finch.

Clarendon's History. “This fact being related by the earl, carries with it his authority too, who was a very great lawyer and chancellor of the realm.” Fortescue Aland, Baron. Fortescue, 419.

Coke (Lord).—*Hale (Lord).*—*Comyns (Chief Baron).* “Three of the very greatest expositors of the law of England.” Cockburn, C. J., in Regina v. Herford, 3 El. and El. 131.

Comyns (Chief Baron). See *Coke (Lord).*

Davies (Sir John). “The great authority of Sir John Davies.” Lord Coleridge, C. J., in Walsh v. The Bishop of Lincoln, 44 L. J. C. P. 253.

“Sir John Davies would have ample experience of the rules of the profession from his eminence in the law; and his opinion is entitled to much weight. Lord Stowell, as appears in a work remarkable for learned research—Wallace's Reporters, p. 167—speaks of him as a poet, a lawyer and a statesman, and highly distinguished in each of these characters.” For an anecdote of the chief justice, see Cunningham's Preface to his edition of Ben Jonson's Works, Vol. I, p. 9.

Equity Cases Abridged. Vols. I and II. The second volume is a “book of no very high character. It is not so high

in character as the first volume." Lord Eldon, in *Duffield v. Elwes*, 1 Bligh N. R. 539. See *Ahrend v. Odiorne*, 118 Mass. 265.

Fleta. See *Bracton*.

Fearne (Mr.). *St. Leonards (Lord)*. "The opinions of Mr. Fearne and Lord St. Leonards are of as high authority as mere opinions can be." Lord Coleridge, C. J., in *Walsh v. The Bishop of Lincoln*, 44 L. J. C. P. 252.

Gilbert, Sir Jeffrey, Lord Chief Baron. Reports of Cases in Equity argued and decreed in the Courts of Chancery, chiefly in the reign of King George I. To which are added some Select Cases in Equity heard and determined in the Court of Exchequer, in Ireland. Folio, London, 1734. Second Ed. fol. 1742.

The following note in the writing of Lord Chief Justice Lee is on the fly-leaf of a copy now owned by the writer: "N. B. This report is taken to be by Lord Chief Baron Gilbert, but I rather believe by somebody that had opportunity of seeing his MSS., who has published them in a bad manner." See the Reporter, p. 313.

Gurney, B. "One of the ablest and most experienced criminal judges who ever sat in our courts." 4 Foster & Finlason, 585, note.

Hale (Lord). See *Coke (Lord)*.

House of Lords, Decisions of. "A judgment of the House of Lords is only binding so far as it necessarily determines some certain proposition; it is not binding as to the reasons given by each of the noble lords, even though they should all concur in giving the same. If, indeed, the reasons for a judgment are to be interwoven with the decision so as to form a necessary part of it, no doubt it is an authority which no one ought to treat lightly, and to which every judge ought to defer, if he can; but he is not bound to do so, though he is undoubtedly bound by the judgment or what may be called its essence and principle." Pollock, C. B., in *In re Capdevielle*, 2 H. & N. 1020.

"Opinions, if not part of the decision, are to be treated with great respect as authorities, but are not binding on the

House itself on a future occasion or on any other court. If the decision is wrong, it must be altered by the legislature." Blackburn, J., in *Harris v. Great Western Railway Co.*, L. R. 1 Q. B. Div. at p. 528, and Mellor, J., at p. 522. Similar language was used by Chief Justice Marshall in delivering the judgment in *Cohens v. Virginia*, 6 Wheat. 399, 400.

Keble's Reports. In the course of the argument in the case of *Farrall v. Hilditch*, 5 C. B. N. S. at p. 851, Mr. Justice Williams observed: "My Brother Byles has just handed me a case which seems to hit the very point, viz: *Barfoot v. Freswell*, 3 Keble, 465. * * * That is exactly in point; though Keble is not generally esteemed as first-rate authority." And in delivering the considered judgment of the court, at p. 583, the learned judge says, "It must be admitted that Keble is of no high repute as an accurate reporter, and the court would be slow to act on a case in that book, if it were unsupported by others. * * * We may also mention that in *Adams v. Gibney*, 6 Bingh. 656, 4 M. & P. 491, although the citation of the case drew forth a strong remark from Park, J., yet the considered judgment of the court seems to take it for granted that, etc. * * * With respect to the authority of Keble, we cannot refrain from referring to the highly valuable and interesting work of Mr. J. W. Wallace, of Philadelphia, *The Reporters*, pp. 207, 208, 3d Ed., from which it appears that more is to be said for the character of this reporter as a 'tolerable historian of the law' than from the remarks made upon him from time to time might have been supposed." 5 C. B. N. S. 854, 855.

Lord Hardwicke, when Chief Justice of the Court of the King's Bench, as reported by Fortescue, 162, observed that "though he was a bad reporter, he was a good register." "It may be added," writes Mr. Wallace, "that his reports help often to explain difficulties in contemporary reports of better credit in general." *The Reporters*, p. 208. And Lord Mansfield once observed, "If both the reporters [Keble and Freeman] were the worst that ever reported, if substantially they report a case in the same way, it is demonstration of the truth of what they report, or they could not agree." *Rex v. Genge*, 1 Cowp. 16.

Kent (Chancellor).—Mr. Justice Story. "Two of the most celebrated writers upon law, Chancellor Kent and Mr. Justice Story, are Americans, and they have contributed certainly more to render law a science, and to render the pursuit of it, I was almost going to say, captivating, than any writers on this side of the Atlantic for thirty or forty years." Lord Chief Baron Pollock in "The Alexander Case," Vol. 1, p. 229. A. D. 1863.

Leonard's Reports. "We have examined the case, for Mr. Sugden (now Lord St. Leonards) says Leonard's Reports were always in high estimation. Sugden on Powers, 1st Amer. Ed., 1817." Kimball v. Boston Athenæum, 3 Gray, 231.

Lewin on Trusts. "Generally acknowledged to be one of the most scholarly of law books." Chute's Equity, p. 40.

Livermore on Agency. "The true doctrine is well stated by a learned text-writer." Bigelow, C. J., in Combs v. Scott, 12 Allen, 497.

Lofft's Reports. "As far as may be collected from a very careless report, the same point seems to have been decided in another case. Lofft, 184." Paley on Convictions, 132, note. 5th Ed.

Lush (Mr. Justice). "High authority on the practice of the courts." Lord Coleridge, C. J., in Westenberg v. Mortimore, L. R., 10 Q. B. 441.

Nisi Prius Reports. It is to be borne in mind that the scope of Nisi Prius Reports is not so much disputed questions of law, (which, if doubtful, are generally reversed,) as the practical application of admitted principles of law in which it is most often that any difficulty exists. In other words, the object of these Reports is not merely, nor mainly, citations for authority, but practical utility. 4 Foster and Finlason, 485.

Oughton (Thomas). Ordo Judiciorum. "A work of great authority in the Ecclesiastical Courts." Arguendo, in Hope v. Hope, 1 Swabey and Tristram, 96.

Saunders' Reports. Notes to Saunders' Reports, by the late Serjeant Williams. Continued to the Present Time by the Right Hon. Sir Edward Vaughan Williams. Two Vols., royal 8vo., 1871.

This work includes the joint Notes of Sir John Patteson and Sir E. V. Williams to the fifth edition of Saunders' Reports; and the Notes of Sir E. V. Williams to the sixth edition.

"The old text of Saunders' Reports contains so large an extent of useless matter, that it has been deemed expedient to omit it, and to substitute for it an abridgment of the several cases to which the old notes may readily be applied. The pleadings to be found in Saunders' Reports have also been omitted, having become worthless as precedents in the present state of the law." Preface. The present work is in fact an adaptation of Williams' Saunders to the law as it now exists in England; and this is effected in a manner advantageous for practical purposes.

Showers' Reports. This note is on the fly-leaf of a copy, in the handwriting of Chief Justice Lee: "These Reports being cited at the Bar, Lord Chief Justice Raymond expressed great dislike to the Reports, and declared he did not think they ought to be permitted to be cited."

Smith's Law of Master and Servant. "The cases on the subject are collected with skill and clearness in Smith's Law of Master and Servant." Erle, C. J., in *Hall v. Johnson*, 3 H. & C. 595.

St. Leonards (Lord). See *Fearne (Mr.)*

Story (Mr. Justice). See *Kent (Chancellor).*

Story on Agency. § 210. "The work of one of the greatest writers on law, of a recent period." Cleasby, B., in *Robinson v. Mollett*, L. R., 7 H. L. 829.

Story on the Conflict of Laws. "A work which it would be unjust to mention, without at the same time paying a tribute to the learning, acuteness and accuracy of its author." Tindal, C. J., in *Huber v. Steiner*, 1 Hodges, 210.

Staunforde. "Is agreed to be a very judicious author." Parker, C. J., in *Jones v. Given*, Gilb. 194.

Strange's Reports. "A faithful reporter," said Chief Justice Willes, (2 Wils. 38,) and no man was more conversant with the reporters and competent to form a correct judgment of their respective merits than this accomplished judge. The

best edition is the third, by Nolan, 2 Vols. royal 8vo., London, 1795.

Here is his epitaph:—

ON STRANGE, A LAWYER.

Here lies an honest lawyer, and that is *Strange*.

Tidd's Practice. "A book of practice of very great authority." Vaughan, B., in *Blakewey v. Edwards*, 2 Younge and Jervis, 562. The edition best adapted to the practice in this country is the ninth, published in 1828.

Tindal (Lord Chief Justice). "A judge who for learning and ability is not inferior to the most distinguished of his predecessors." Lord Campbell, in *The Queen v. Miller*, 10 Clark and Finnelly, 746, 747.

Twisden, J.—Wyndham, J. "Names of great authority." Lord Kenyon, C. J., in *Milner v. Milner*, 3 T. R. 631.

Wallace (Mr. J. W.). See *Keble's Reports*.

Ward's (Robert) Law of Nations. "Mr. Canning said of Ward, the author of *Tremaine*, who wrote also on the *Law of Nations*, that his law books were as pleasant as novels, and his novels as dull as law books. In that instance, there was more truth in the disparaging half of the remark than it was at all necessary that there should be in anything so witty." Horace Binney Wallace.

Webster's Dictionary. Lord Chief Baron Pollock, in summing up in a very celebrated case, said: "Gentlemen, I have looked, so that I might not go wrong, (as we have the advantage of having it here,) at Webster's American Dictionary, a work of the greatest learning, research and ability. No one can complain that I refer to that." Report of "*The Alexandra Case*," Vol. 1, p. 232.

Wensleydale (Lord). "A lawyer of the greatest eminence, formerly a member of this court, and now a member of the House of Lords, to whose opinion I, in common with all the profession, attach the highest importance, once admitted," etc. Pollock, C. B., in *In re Capdevielle*, 2 H. & N. 1018.

Willes (Mr. Justice). "Who deserves well of all who take interest in the administration of the law." Erle, C. J., in *Regina v. Ragg*, Bell C. C. 219.

Wood (Baron). "The freedom and intrepidity of Baron Wood, as displayed in Wightwick's Reports, are worthy of all commendation." Judge Metcalf, in the North American Review, Vol. xv, p. 72.

Wyndham, J. See Twisden, J.

FRANKLIN FISKE HEARD.

BOSTON, MASS.

VII. PRESUMPTION OF SURVIVORSHIP WHEN SEVERAL PERSONS PERISH BY A COMMON CALAMITY.

An interesting case was lately tried in the Circuit Court of the United States for the District of Louisiana, before the Hon. W. B. Wood, involving the above question, and which, inasmuch as the law of Louisiana on this subject, adopted from the Napoleon Code, differs in many essential particulars from the common law of England and most European countries, and the enquiry itself seldom occurs, an outline of the case and of the authorities cited may interest some of your readers.

LOSS OF THE STEAMSHIP EVENING STAR.

This steamship left New York, bound for New Orleans, on the 29th September, 1866. Being a regular and favorite packet between the two ports, she had, besides a valuable cargo, upwards of two hundred and fifty passengers, among which were a French opera troupe, several females of no particular profession, under the surveillance of a matron named Flora, and a few southern families returning from the North, etc.

Among the latter were Mr. James Gallier, sen., and his wife, who, after several years' absence in Europe, were returning to New Orleans, the place of their residence, and the residence of James Gallier, jr., the only child of Gallier, sen., by a former wife.

As James Gallier, sen., and his wife constitute the principal personages in the events we are about to narrate, it is proper that we should give a sketch of their characters.

James Gallier, sen., was born in Ireland, and was emphatically what in modern phrase is styled a *self-made man*, which

means, we suppose, a man who, by the exertion of his own energy and intelligence, has developed his mind and acquired a position in society which his competitors had been unable to attain. In this sense we believe that nearly all men who have acquired distinction in any department of science or art are self-made men, for to men of this description

"A field is open'd, wide as Nature's sphere—
Nay, wider; various as the sudden acts
Of human wit, and vast as the demands
Of human will."

Mr. Gallier studied architecture and architectural drawing in Ireland, and went, while still young, to England, where he pursued his studies with great zeal and success. Finding that the prospect of obtaining permanent and profitable employment in England was doubtful, he emigrated to the United States in 1832 and settled in New Orleans in 1834. Here he soon obtained ample employment, which he pursued with great energy and success until the year 1849, when he retired from business, leaving his son, James Gallier, jr., a gentleman in every respect capable, to continue it for his own benefit.

Mr. Gallier, sen., was twice married, and his son James Gallier, jr., was the sole offspring of the first marriage. His wife died in 1843, and in 1850, after he retired from business, he married again a Miss Catharine Robinson, of Barre, Massachusetts, with whom he had become acquainted in Mobile. This lady is represented as amiable, affectionate, accomplished and greatly attached to her husband, who, in return, cherished her with a warmth of affection which increased with his advancing years, and of which his will, by which he left her a valuable house and lot in New Orleans and five thousand dollars in gold, etc., affords convincing proof. Miss Robinson lost her mother when only a few weeks old, and was taken charge of and educated by her aunt, Mrs. Niles, whose husband was a senator in Congress from the state of Connecticut. She appears to have received a good education, and to have spent some time with her aunt in Washington, and there enjoyed the benefit of fashionable society.

But her aunt died, her father had married again and had several children; when, therefore, compelled to return to her father's home in the village of Barre, she does not appear to have found her new home congenial to her taste, and resolved to rely on her own resources. Thus, we find her as a teacher in Mobile, where she became engaged to Mr. Gallier, to whom she was married in Charleston in 1850.

Mr. Gallier was born in 1798, and was fifty-two years old when he married his second wife, and Miss Robinson was born in 1822, being consequently only twenty-eight years old on the occurrence of that event. Mr. Gallier, notwithstanding his age, was a person of prepossessing appearance, remarkably erect carriage, and dignified and manly deportment. There was something so calm, collected and serious in his demeanor, without the appearance of sternness, that he inspired respect at first view, which was invariably increased on further acquaintance. By her marriage Miss Robinson was raised from dependence to affluence, and the prospect of spending several years of her life in visiting the capitals of Europe, in the enjoyment of the advantages wealth could confer, we may presume had some charms for a lady who, during her stay in Washington, had probably heard many things that would beget the desire of visiting foreign countries. Mr. Gallier had no living children with his second wife at the time of his embarking aboard of the Evening Star.

The above facts we deem a necessary introduction to the controversy which subsequently arose, relative to Gallier's bequest to his wife, above spoken of.

The Evening Star left New York on the 29th September, 1866, and the first three days passed with comparative fair weather and smooth seas, and without any prognostics of the calamity which was soon to befall her. Cape Hatteras was passed in safety; but on the 2d October a strong southeasterly breeze overtook the vessel, accompanied by a heavy swell, which in the evening increased to a gale, and during the night assumed the form of a hurricane, or rather cyclone. The fury of the wind went on increasing, extinguished the fires of the engines, rendered the vessel unmanageable,

caused it to fall in the trough of the sea, while the water in the hold rose with such rapidity that in spite of the almost superhuman exertions of the passengers, male and female, and the crew, it became evident the vessel could not outlive the storm. The scene which ensued, as described by the survivors, was solemn and appalling. The passengers, both male and female, exhausted by their toils in bailing the vessel, when convinced that all hope of saving her was lost, met their fate with a resignation truly admirable. The life-boats were lowered, but few of them could live in the raging waves, which tossed the ship as a feather on their crests. When the vessel finally went down, the loose spars and lumber on the deck, and the woodwork detached by the pressure of the sinking steamer, floated around the wreck and destroyed many of the passengers, who, trusting to their life-preservers, had thrown themselves into the water in the hope of being rescued by the life-boats. Three of these, after having been repeatedly capsized, succeeded in leaving the vessel and in saving twenty-three persons, of which seventeen belonged to the crew of the vessel and six were passengers, among which two were females; Mr. and Mrs. Gallier were lost. The consternation which the loss of this steamer caused in New York and New Orleans and throughout the Union was great; but, like all other events in this busy country, it was soon forgotten. Some ill-natured comments on the condition of the vessel and the capacity of the master were made by the agents of rival lines, but it does not appear that any serious enquiry was ever made to ascertain the real cause of the disaster.

There resided at the time in the city of New Orleans a gentleman named Henry D. Stone, a lawyer by profession, a native of Massachusetts and well acquainted with the Robinson family of Barre. He had the reputation of being a shrewd lawyer, and had been employed by Mrs. Gaines to unravel the very complicated suits in which she had been engaged for many years. It is supposed that he suggested to the father of Mrs. Gallier that, owing to the difference of their age, the law presumed that the wife had survived the

husband, and that he and his children, as his daughter's heirs, could recover the legacy. It is certain that he was employed as counsel in the cause, and brought the suit, but not until after the death of James Gallier, jr., who had, as sole heir, taken possession of the estate of his father. The suit was consequently brought against the widow of James Gallier, jr., and her four minor children, and it alleged, in substance, that Catharine Robinson, wife of James Gallier, sen., survived her husband, and that her father and her half-brothers and half-sister were, as her heirs, entitled to the legacy.

According to the law of Louisiana no one can inherit from another unless it be shown that he was alive at the time of the opening of the succession, *i. e.*, at the death of the person of whom he claims to be the heir, and all legacies *lapse* (become null) if the legatee die before the testator. Hence it becomes important, in cases where several persons *entitled to inherit from each other* perish by a common calamity, such as shipwreck, battle, conflagration, etc., to determine who died first. This question has given rise to numerous commentaries, ancient as well as modern, and has embarrassed the jurists of most countries, and can as yet not be considered as definitively settled in any.

The civil code of Louisiana, following in this respect the Napoleon Code, provides "that if several persons *respectively entitled to inheritance from one another* happen to perish by the same event, such as a wreck, a battle or a conflagration, without any possibility of ascertaining who died first, the presumption of survivorship is determined by the circumstances of the fact." (Art. 936.)

"In the absence of circumstances of the fact, the determination must be decided by the probabilities resulting from the age, strength and difference of sex according to the following rules: (Art. 937.) If those who have perished together were under the age of fifteen years, the eldest shall be presumed to have survived."

"If both were above the age of sixty years, the youngest shall be presumed to have survived. If some were under fifteen and some above sixty, the first shall be presumed to have survived." (Art. 938.)

“If those who have perished together were above the age of fifteen years and under sixty, the male must be presumed to have survived, where there was an equality of age or a difference of less than one year.”

If they were of the same sex, the presumption of survivorship, by which the succession becomes open in the order of nature, must be admitted: thus the younger must be presumed to have survived the older. (Art. 939.)

The preceding provisions of the Louisiana code are adopted textually from articles 720, 721 and 722 of the Napoleon Code, and establish a series of artificial presumptions often at variance with experience, and which we believe have not been received except in France and Louisiana.¹

¹ Article 720 of the Napoleon Code, as it stood originally, declared that when it could not be ascertained who died first, the age and sex of the parties should guide the judges in their decision. To this the Consul Cambacérès objected as too absolute, and the article was accordingly modified. (Motifs et discours du Code Civil, vol. II, p. 321, ed. of Firmin Didot, Paris, 1838.) As the law of France now stands, the presumptions created by law are not resorted to unless in the absence, 1st, *of material facts*, resulting from the appearance of the body, examined by physicians; 2d, *the testimony of persons who witnessed the event*; and 3d, *circumstances of fact*. Thus, in deciding cases arising out of the massacre of the Huguenots, on St. Bartholomew's Day, the Parliament of Paris acted on the presumption that the murder of the older persons preceded that of the children and the younger persons, believing that the assassins would in the first place destroy those who were able to offer resistance, in preference to those from whom they had little to fear. (Stryk. Diss. 10, c. 6, No. 11.) So in the case of the wife of Bobé, daughter of the celebrated Dumoulin, who, together with her two children, one aged twenty-two months and the other eight years, was murdered by robbers on the 19th February, 1572, the court presumed that the mother was killed first. (Pothier Traité de Suexes, c. 3, § 1; Merlin Rep., art. Mort, § 2, 1.) Merlin quotes l. 32, § 14, d. 24, which declares: “Si quidem possit apparere quis anté spiritum posuerit, expedita est quæstio; si vero non appareat, difficilis est quæstio;” and he adds: “Si cette question est epineuse par ellemême, on peut aisement se persuader que les interprètes et les docteurs en out encore augmenté embarras.” Merlin has, with his usual industry and thorough acquaintance with the French and Roman law, analyzed and commented on the different decisions had in France from the earliest period to the present time, and a perusal of them, we think, will show that they cannot be referred to any certain standard, or definite rule.



But cases often arise in which no human being survived who witnessed the events, as where a vessel is lost at sea and no tidings of the loss have ever been obtained. In such cases, and in such cases alone, the laws of France and of Louisiana establish certain presumptions for the guidance of the courts, which, although not always in conformity to the usual course of events, were probably adopted to prevent the exercise of an arbitrary discretion, which the law always desires to check.

The theory on which the presumptions in the French code are founded divides human life into three different periods. *The first* begins at birth and ends at puberty (fifteen years). *The second* begins at fifteen and ends at sixty years, and the third begins at sixty. In the first period, the oldest is presumed to have survived; in the second and third periods, the youngest. Hence if in the third period a man over sixty perish at the same time with a child of only one year, the child is presumed to have survived. Mourlon, a very able commentator on the Napoleon Code, calls this a shocking presumption, but says, by way of consolation, "*mais il n'est pas de présomption qui, poussée à ses dernières limites ne touche à l'in vraisemblance.*" That may be so, but that which is improbable ought not to be relied on as a rule of decision in a court of justice.

The counsel who brought the suit for the heirs of Mrs. Gallier evidently relied on the disparity of age which existed between her and her husband. In proportion as he examined the law applicable to the question, he appears to have become convinced, that inasmuch as Mrs. Gallier could never be regarded as the heir of her husband, as long as he had children and grand-children, his lawful heirs, she would be compelled to establish her survivorship by facts tending to prove her allegation.

In order to ascertain the facts of the case, the testimony of some of the survivors was taken, which established conclusively, that a minute or two before the vessel sunk, the waiter, who attended Mr. and Mrs. Gallier, saw them in their state-room, Mrs. Gallier lying down and Mr. Gallier standing

up and holding on to the door. Mr. Gallier was perfectly calm and collected, while his wife appeared sick. The vessel went down stern foremost, as soon as Gannon, the waiter, had attained the deck, he having effected his departure from the cabin through the skylight, because the staircase was encumbered by passengers seeking to reach the deck. This testimony having been corroborated by other evidence, it became apparent that Mr. and Mrs. Gallier perished in their state-room on the foundering of the steamer.

The law of Louisiana and of France, as we have shown, only apply the presumptions of survivorship established by their codes, to cases where persons, who perish by the same calamity, are entitled to inherit from each other. Under the provisions of art. 76 of the Louisiana Code, the heirs of Mrs. Gallier were consequently bound to prove, affirmatively, that she survived her husband, of whom she was not the heir. An attempt was accordingly made to establish the fact that she was seen floating in the water and helped into one of the boats after the vessel sunk. But the testimony on this subject was given by witnesses, who were proved not entitled to any credit, and who deposed to facts not only improbable, but proved to be false.

This case being the only one that had occurred in Louisiana, no adjudications could be found to guide the court in the application of the law to the facts it presented. Hence the French commentators of the Napoleon Code were referred to, in order to show how the tribunals of that country construed the law. Marcadé,² Demolombe,³ etc., were re-

* Marcadé, V., one of the most acute and learned commentators of the French code, though in general "*un peu tranchant*," is justly regarded as one of the ablest expositors of its enactments. He says in his "*Explications du Code Civil*, vol. III, p. 17 (5th Ed., Paris, 1850): "La raison proclame que celui qui pretend à l'exercice d'un droit doit prouver que ce droit lui appartient. Ainsi quand une personne vient de reclamer comme siens des droits quelle dit s'être ouverts un profet d'un individu qui les lui a transmis ensuite par sa mort, c'est à elle de prouver que cet individu, aujourd'hui mort, a veritablement recueilli les droits en question ; par exemple, s'il s'agit d'une succession, c'est à elle de prouver que l'individu par la mort duquel elle pretend avoir recueilli le droit, vivait

ferred to, and the principles they laid down, in so far as consistent with reason and justice, it was insisted ought to guide the court in its interpretation of the law.

encore quand cette succession s'est ouverte ; c'est à dire de prouver qu'il a survécût à l'autre defunt, à celui dont la succession est réclamée."

³ Demolombe, the latest and most elaborate commentator on the Napoleon Code, vol. XIII, 3d Ed., p. 131, maintains that the legal presumptions established by articles 721st and 722d of the Code apply exclusively to *intestate successions* in which *the parties are entitled to inherit from each other*, and that a contrary construction would be not an interpretation of the law as it stood, but the creation of a new law, which appertains exclusively to the legislature, and he concludes: "*Donc on ne saurait les étendre, ni en matière de succession ab intestat, à aucune autre hypothèse ; ni encore moins, à toute autre matière que celle des successions ab intestat.*" At p. 132 he adds: "Quiconque réclamera un droit échu à un individu dont l'existence ne sera pas reconnu, devra prouver que le dit individu existait quand le droit a été ouvert: jusqu'à cette preuve, il sera non recevable dans la demande."

The rules thus adopted by the Napoleon and Louisiana codes do not appear to have the sanction of the Roman law and its commentators, and we believe that they do not prevail in any other part of Europe. It is, no doubt, true, that Mr. Treilhard, counsellor of state, who explained the motives of the framers of these laws and urged their adoption, said: "Elle ne sont pas nouvelles: elles avaient été sanctionnées par la jurisprudence, et je ne crois pas que dans la fatale obscurité qui enveloppe un événement de cette nature, on ait pu établir des règles sur des bases plus sages."

It is possible that precedents may be found for each and every one of these rules, as they may be found, after diligent search, for almost every absurdity; but precedents, unless sanctioned by reason and practical utility, ought not to be incorporated into a code intended as a rule of conduct for ages.

The distinguished jurist, who says that the rules incorporated in the code have been sanctioned by jurisprudence, does not refer us to any authority on the subject, and we have in vain consulted the ablest commentators on the Roman law in order to find a support for the opinion. Cujas¹ [see note, p. 608], justly regarded, especially by the French, as one of the ablest commentators on the Roman law, declares, "*duobus pariter mortuis, non videtur alter alteri supervixisse; excipiuntur parentes et liberi.*" For the Roman law applied it only to parent and child, although, by analogy, it was occasionally extended to dower, etc. The learned reader, curious to trace this question to the fountain head, will find in Bartolus,² Menochius,³ and Covarruvias⁴ [see notes, pp. 608-9] the safest and most intelligent guides to direct him in his researches. For

In directing our attention to the jurisprudence of England, we find that there, also, questions of this nature have occasionally occurred, and provoked learned and elaborate examinations. The law of this country (England), says Mr. Best, in his treatise "On Presumptions of Law and Fact," (London, 1844,) "does not appear as yet to have adopted any decided rule on this subject, but, whenever it can be done, leaves the question of which of the two parties survived the longest to be determined by a jury, or ecclesiastical judge, according to the facts of the case, such as the comparative age, strength and danger to which they were respectively exposed, and any other surrounding circumstances calculated to throw light upon it.⁴ He next proceeds to examine the case of General Stanwix, who, with his wife and daughter by a former marriage, perished at sea on a voyage from Dublin to England.⁵ This case was compromised at the suggestion of Lord Mansfield, who said he knew of no legal principle on which he could decide it.⁶ In the case of this purpose we refer him to the "Opera Omnia" of D. Covarruvias, vol. II. "Variarum resolutionum," c. vii. "Quis præsumatur præmortuus ex pluribus, pp. 142 to 148, Lyon Ed. of 1681 by Boisat. Also Menochius, De præsumptionibus, Book 6th, Præsumptio, 50, Ed. published in Cologne by Antonius Hierat, in 1615, p. 1088 et seq. Menochius remarks: "Hac de re multa docté et acute scripserunt Bart. et Soci, in l. quod de pariter. Dig. de reb. dub. Alciat in tract. De præsumpt. regula 1, præsumpt. 49; et copiosius meliusque Dida. Covar. lib. 2 varias resolut. c. 7. Ego Didaci traditiones quas magni facere soles, ab singulari viri eruditionem, in multis secutus, multos casus ita ex ordine distinguo absque constitur."

The commentators of the Roman law who have treated this question are numerous, but none of them more fully and more lucidly than Didacius or Diego Covarruvias.

⁴ The old case of Broughton v. Randall, Cro. Eliz. 503, is well known, where a father and son were seized as joint tenants to the heirs of the son. Both father and son were hanged at one time in one cart; but because the son, as was deposed by some of the witnesses, survived, as appeared by his shaking his legs, and probably some other tokens, his wife was held entitled to her dower.

⁵ R. v. Dr. Hay, 1 Wm. Blackst. 646. This case was considered at the time altogether novel, and Mr. Fearne composed two ingenious arguments, one in favor of each of the claimants. See his posthumous works.

⁶ Greenl. on Ev., § 30. Note on Taylor v. Deplock, 2 Phill. 261.

Wright v. Sarmuda,⁷ Sir Wm. Wynne, in delivering his judgment, says: "*I always thought it the most rational presumption that all died together*, and that none could transmit rights to another." This case was followed by Taylor v. Diplock,⁸ in which case Taylor had constituted his wife sole executrix and residuary legatee. Both husband and wife were drowned in a transport, on the 14th January, 1814, whereupon a question arose whether the relations of the husband or those of the wife were entitled to the residue. The case was fully argued, and cases from the civil and common law cited. Sir John Nicholl, who decided the case, held that those who pretended that the wife, the residuary legatee, survived her husband, were bound to prove it, and as the evidence on that subject was insufficient, he held the husband, as last owner, was entitled to the property, the survivorship of the residuary legatee not having been proved. The judge assumed that both perished at the same moment, and said, "*I am not deciding that the husband survived the wife.*" In the case of Mason v. Mason,⁹ a father bequeathed £5000 to each of his children, of which he had ten, nine of whom survived him. Having embarked in Bengal with his son Francis in a vessel for England, the vessel was lost at sea and all on board perished. The case came on for further direction before Sir W. Grant, M. R., the master having reported that he was unable to state whether Francis survived his father. The Master of the Rolls in that case is said to have held, "*that he knew of no case in which an English court of justice had adopted presumptions of fact from the rules of the civil law.*" The plaintiff's counsel pressing an issue, was directed to try the question whether the son was living at the death of his father. The result of that issue is not known. In the case of Colvin v. H. M. Procurator General,¹⁰ where an intestate and wife were drowned in the river Ganges, administration was granted to a creditor of the husband with-

⁷ Also cited in a note in Taylor v. Diplock.

⁸ 2 Phillmore's Eccl. Reps. p. 261.

⁹ 1 Meriv. 308, decided March 11, 1816.

¹⁰ 1 Hagg, N. S., 92, 1827.

out citing the representatives of the wife, on the *prima facie* presumption that the husband survived, the property being small and the debt large. The same author further cites *In the Goods of Selwyn*¹¹ and *In the Goods of Murray*,¹² *Satterthwait v. Powell*¹³ and *Selleck v. Booth*.¹⁴ From all which the author deduces the conclusion that the law of England recognizes no artificial presumptions in cases of this nature, but leaves the appreciation of the facts of the case to the jury or ecclesiastical judge.

One of the latest and most interesting cases on the subject is the case of *Underwood v. Wing*.¹⁵ This case was heard before Lord Chancellor Cranworth and two common-law judges, Justice Wightman and Baron Martin, whom the chancellor had invited to sit with him. In that case the testator had bequeathed his estate to his wife, and in the event of her dying during his life, to A. B., upon certain trusts, which failed, and after that he bequeathed the whole property to J. W. The testator and his wife were both swept into the sea by the same wave, after which neither of them were seen. In that case it was held that the burden of proof that the husband survived was on J. W., inasmuch as his title depended on the survivorship. It was proved in this case that Underwood, the testator, was a robust and healthy man, a good swimmer, and that his wife was in weak health. The medical witnesses, among whom was Dr. Taylor, an eminent writer on medical jurisprudence, with two other medical witnesses, stated that the facts of his being a good swimmer, etc., rendered it almost certain that the husband had survived. But two other medical witnesses declared that on this subject physicians could give no opinion of any value; that a woman was just as likely to survive a man, and a feeble and sickly person a strong and healthy one, as the contrary. The case was ably argued by eminent counsel, and the law judges and the chancellor concurred in their opinions. The latter, in commenting on the opinion of the medical witnesses,

¹¹ 3 Hagg., N. S., 748, Hil. T. 1831. ¹² 1 Curteis, 596, Hil. T. 1837.

¹³ Id. 705, Jan. 31, 1838 ¹⁴ 1 Y. & Col. V. C. 117, Dec. 12, 1841.

¹⁵ 19 Beav. 459; S. C., 4 De G. M. & G. 633.

said: "I give the medical gentlemen entire credit for speaking scientifically, and, as they believe, quite accurately (though I do not think that they themselves are very confident on the subject); but to take what they say, calculating and reasoning *a priori*, for that is all it comes to, as to which of two persons may have breathed a few seconds the longer at the bottom of the sea, as establishing the fact, seems to me to be quite misunderstanding human testimony. I am utterly unconvinced that they can tell us which of these two persons died first, even supposing them to be taken and quietly submerged to the bottom of the sea."¹⁶ The foregoing decision appears to amount to this: *that unless it be shown by satisfactory evidence which died first, the decision must be against the party upon whom rests the burden of proof.*

The question involved in this controversy went by appeal to the House of Lords. (See the case of *Wing v. Angrave and Tully*, 8 H. & L. Cases, 183.) In this case it was decided:

1st. "That there is no presumption of law arising from age or sex as to survivorship among persons whose death is occasioned by one and the same cause."

2d. "Nor is there any presumption of law that all died at the same time."

3d. "The question is one of fact, depending wholly on evidence, and if the evidence does not establish the survivorship of any one, the law will treat it as a matter incapable of being determined. The *onus probandi* is on the person asserting the affirmative."

The principles thus established must be considered as the actual law governing the courts of England, and their reasonableness will hardly be disputed. They discard theories,

¹⁶ The opinion of the chancellor appears not only more reasonable, but more conformable to the principles of the medical science than that of Dr. Taylor. *Asphyxia by submersion* exhibits a great variety of phenomena, for sometimes a feeble child is resuscitated after having been submerged for some minutes, while there is no possibility of restoring the father immersed at the same time, though incomparably more healthy and stronger. See *Traité d'Asphyxie par Docteur Marc, Médecin du Roi* etc., Paris, 1846.

which are, at best, founded on mere conjectures which can rarely, if ever, be verified.

The principles on which the courts of England act appear to be recognized and acted on to a certain extent by Holland, the German and Scandinavian States, while in the south of Europe, Italy, France and Spain,¹⁷ the doctrines of the Roman law and its commentators are adopted with some modifications.

The cause of Gallier was elaborately argued before an intelligent jury, by General L. A. Sheldon for the plaintiff, and by Gustavus Schmidt and H. M. Spofford, late judge of the Supreme Court of Louisiana, for defendants. Judge Spofford exposed the law and the facts of the case in a most masterly and impressive manner. The court having charged the jury that the articles of the civil code creating a legal presumption of survivorship in certain cases did not apply to the present case; that the plaintiffs, before they could recover, must prove by satisfactory evidence that Mrs. Gallier survived her husband; that it was the province of the jury to weigh the evidence, reconcile, as far as possible, discrepancies, and determine the credibility of the witnesses; and if, after a careful and conscientious examination of the whole evidence, they should arrive at the conclusion that Mrs. Gallier survived her husband, they should give a verdict for the plaintiff. But if, on the contrary, the evidence in the cause failed to convince them that she survived her husband, the defendants were entitled to their verdict.

The jury, having retired, returned after a very brief absence with the following verdict:

“NEW ORLEANS, April 12th, 1876.

“We, the jury, find a verdict in favor of the defendants in the within case.

“(Signed)

ALBERT MAES, *Foreman.*”

The verdict having been recorded, judgment was rendered in conformity thereto.

¹⁷ In Spain, *Las siete partidas*, Law 12, Tit. 33. Partida 7, de las casas dubdosas etc. governs this subject. Note, however, that in Spain puberty is attained at fourteen years, in France at fifteen.

No bills of exception having been taken by either party on the trial, and no motion for a new trial made by plaintiffs within the time prescribed by law, the judgment in favor of defendants was signed and the controversy ended.

GUSTAVUS SCHMIDT.

NEW ORLEANS.

¹ Cujas, James, born at Toulouse in 1520, professor of law at Bourges, was regarded as the most profound jurist of his age, and such was his reputation that he was at different times asked to accept professorships of law not only in different parts of France, but even in Italy. All the jurisconsults of Europe speak of him as the ablest interpreter of the Roman law, and Chancellor d'Agesseau says: "Cujas has better spoken the language of the law than any modern, and probably as well as any ancient." Scholars flocked to his lectures from every part of Europe. The works of Cujas were published by Tabrot at Paris in 1658, in 10 vols. folio, and republished in Naples in 1722, 1727, in 11 vols. folio. Cujas died in 1590.

² Bartolus, one of the most celebrated jurisconsults of modern times, was born at Sasso Ferrato in 1313. He was first professor of law at Pisa, and afterwards at Perouse, where he died in 1356, in his forty-fourth year. Dumoulin, who was no flatterer, styles him "the corypheus of the interpreters of the law." He appears to have been a man of great erudition and remarkable intellectual vigor. His commentaries embrace every part of the Roman law, and they exercised not only great influence at the time he lived, but for centuries afterwards, on the jurisprudence of Germany, Italy, France, etc. Time has long since obscured his glory, and his works are no longer read; in this respect he has shared the fate of those who have laid the foundation of a science whose progress, as it passes through the hands of their successors, gradually receives so many additions and undergoes so many modifications, that the names of its founders, if not entirely forgotten, are scarcely remembered.

³ Covarruvias y Leyva, Diego, surnamed the Spanish Bartolus, was born at Toledo in 1512. Having acquired an extensive knowledge of the languages and of jurisprudence, he taught the common law at Salamanca at the age of twenty-six years, and was appointed professor at the College of Oviedo. The library of that city, one of the most extensive of Spain at the time, is said not to contain a single volume not enriched with some notes of his hand. Philip II appointed him Bishop of Cindad Rodrigo in 1560, and charged him with the reformation of the University of Salamanca. He was subsequently appointed, jointly with Hugo Buoncompagno, (afterwards Pope by the name of Gregario XIII,) to attend the Council of Trent. In 1565 he was transferred to the See of

Segovia, and in 1572 he was appointed president of the Council of Castille, and two years afterwards, president of the Council of State, and died at Madrid 27th September, 1577. Favre, Grotius, Menochius and a host of learned men speak of him as a man whose skill in the management of affairs was great, as was his integrity. His works have been frequently published; the best edition is that published in Geneva, with additions by Ybannes, in 1762, 5 vols. folio.

⁴ Menochius, Jacobus, a celebrated jurisconsult, born in Pavia in 1532, where he was appointed professor in the university, where his lectures soon established his reputation throughout Italy. In 1566 he was appointed first professor at Padua, where he continued his instructions for twenty-three years, when, yielding to the desire of his fellow-citizens, he returned to Pavia to occupy the chair left vacant by the death of Nicolas Gratiani in 1589. Philip II, King of Spain, appointed him senator, and afterwards president of the Council of Milan. He died at Pavia on the 10th August, 1607. He has left several works, some of which are highly esteemed even at this day, among which the one entitled "*De Præsumptionibus, Conjecturis, Signis et Indiciis Commentaria*" is the most renowned, and is frequently consulted not only in the countries that have retained the Roman law, but also in those governed by local laws. It is a work of immense research, and displays extraordinary sagacity. Leibnitz esteemed it highly, and intended to abridge it, but his numerous other occupations prevented him from carrying his intention into effect.

VII. BOOK REVIEWS.

COMMENTARIES ON THE LAWS OF ENGLAND. By HERBERT BROOM, LL.D., of the Inner Temple, Barrister at Law; Reader in Common Law to the Inns of Court; author of "A Selection of Legal Maxims," etc.; and EDWARD A. HADLEY, M.A., of Lincoln's Inn, Barrister at Law; late Fellow of Trinity College, Cambridge. In two volumes; with Notes by WILLIAM WAIT, Counsellor at Law. Albany, N. Y.: John D. Parsons, Jr. 1875.

These two handsome and compact volumes are no doubt already familiar to many members of the bar, and will soon become so to most. Their utility is so obvious that no one can fail to see it, and the highly respectable name of Mr. Broom is of itself a passport to general favor. They are simply the Commentaries of Blackstone re-written, in such a way as to leave out what is obsolete, and to add whatever has come into being since Blackstone wrote. The undertaking is somewhat a novelty in the law. We have had annotated editions, revised editions and *variorum* editions of all kinds; but the absolute re-writing of an old and standard work is something that is at least uncommon. But the novelty consists perhaps in the candor of the writers as much as in anything else; for they have imported so much that is really original into the work that many and inferior authors would not have hesitated to change the arrangement of the matter a little, and to claim that it was a new book. But here we have all the chapters and divisions of Blackstone faithfully and honestly preserved. No literary trustee could have performed the labor with more commendable fidelity. Perhaps greater changes have taken place in the laws of England since the great commentator laid down his pen than have taken place in the previous two centuries. To reconstruct the law as it now stands demands that corresponding alterations should be made in the present work; but the edifice that Blackstone erected has been no further altered than the law has been altered by the hand of Time. The changes in the text simply correspond with the changes of the law. Beyond this everything has been preserved, as if by the natural instinct of filial piety. We believe that the ex-

ample thus set is one worthy of being followed. If modern writers would be content to follow thus in the footsteps of their honored predecessors, expressing what still remains true in the very language which time has made familiar to the profession, instead of seeking to clothe old principles in new words, a confusion at times akin to that of Babel would be happily avoided, the law would better preserve its form and certainty and the forlorn hope of modesty would receive an unexpected support. Nor would the merit of the performance be diminished in any respect. To discharge such a task with accuracy requires the utmost discrimination, learning and ability. It is not to every daub that the work of restoring the paintings of the great masters is entrusted. Whoever performs that duty must have a talent, an appreciativeness, a discipline, that render him not an unworthy associate of the genius of the master himself. The present writers represent their task as being "very formidable." No one to whom it did not thus present itself would be competent to undertake it.

There have been so many sharp criticisms by Bentham, Austin, Ames and others on the classification of Blackstone, that we almost confidently expected to find some modification in the present work in that respect. We have no doubt but that many of these criticisms are legitimate and just; none but that Mr. Austin's proposed classification is far more logical than that of Blackstone. But there are other things in the world besides logic; and among them prominently are "old use and wont." Lawyers are very practical men in such matters; less anxious to have their tools arranged in any symmetrical order than to have them handy and bright. For all these errors of Blackstone, if such they be, there is the ample retribution of long-established intimacy and familiarity. The run of his chapters is known like that of the alphabet. A new order would not render them more convenient or explicit: it would put a double labor on the reader who is acquainted with the old. But if there is any one who would reprove the course thus pursued as being a kind of stupid conservatism or tame servility, he can scarcely fail to admire the self-abnegation which it evinces, the tender and affectionate reverence with which the venerable remains of a great jurist have been handled.

The changes occurring in the body of English law since Blackstone wrote have been indeed vast and sweeping; so great that some of our law schools have—very unwisely, as we think,—dropped the Commentaries from their courses of study. But cer-

tainly no lawyer would dare avow ignorance of his stupendous work. Few could resist the fascination which he threw around the driest topics of the law, the attraction of a style always graceful, always calm, always animated. Many lawyers, and they of the best, make it a rule to read over the Commentaries every year or two. Other books pertaining to special branches of the law have special utility; but there is need often to look at the law as a whole, to see how its different departments are grouped, how related, how co-ordinated, that we may be able to perceive its hidden harmonies, and to avoid the mishaps that attend the keen but narrow vision of the case lawyer. The present work will enable many to renew their acquaintance with an old authority under circumstances of new interest. Whatever has been effaced by the hand of innovation or the altered circumstances of more modern life has been replaced in such a skilful way that the spirit of Blackstone seems to pervade the whole work; which derives an increased attraction from the fact that it is the most crabbed part of the law that has fallen into decay, and that legislation has abolished much that was harsh in its nature, and which Blackstone unfortunately seemed to defend. These volumes also present a thoroughly trustworthy chart of the great outlines, and of very many of the details, of the law of England as it exists to-day; they show how the law has advanced in some directions; how in others it has receded from positions previously taken. As explanatory of the later divisions of the English courts, they are of the greatest service. Nor is their value in any slight degree enhanced by the copious additions of the American editor. As such, Mr. Wait has a wide and well deserved reputation. Doubtless some annotators have been more curiously analytic, but hardly any more affluent in materials, or possessed of more skill of arrangement and close condensation. With the text and these notes, the practitioner will have but little trouble in getting a hint or a "lead" on almost any question of the law. The real faults of the book are the very faults of Blackstone, somewhat expunged and mitigated by time; and the faults of Blackstone, constantly inveighed against, have been as constantly overlooked in favor of his tremendous array of preponderating virtues. The book is one that ought to be read, and may be read both for profit and for pleasure; it is one to which frequent recurrence must be made, a kind of planetarium—if one might be allowed so to speak,—in which the whole system of our law is displayed on a reduced and intelligible scale. It is probably too late

to speak of a man of one book as being a dangerous man ; but if there is any single book of the law, which, being thoroughly understood by the lawyer, would render him unusually dangerous to an adversary, this is perhaps that book above all others. It contains in itself the germ of everything that is to be found in the law, and whole libraries are made out of the fabric which it supplies ; being indeed but collections of logical conclusions drawn from the more general principles here propounded.

A TREATISE ON THE LAW OF PERSONAL PROPERTY. By JAMES SCHOULER, author of "Domestic Relations." Two volumes. Boston : Little, Brown & Co. 1876.

The first volume of this work appeared in 1873, and was received with the same favor which had been accorded to the author's previous labors. The second volume, which completes the plan, and with the first covers the entire ground of Personal Property Law, as distinguished from Real Property, has just been published. We are thus enabled to judge of the scope of the work, of the necessity for it, and of its merits. The author states the reason which led him to undertake it. He chanced some years ago to read the following from Mr. Bishop: "Our law books," observes this latter gentleman, "do not to any great extent treat of personal property under a separate head, the same as they do of real estate. A treatise which shall do this well is really a *desideratum* in legal literature." The force, originality and justness of these words, says Mr. Schouler, induced him to endeavor himself to supply this *desideratum*; the result is the treatise now before us. We confess to some doubts as to the wisdom of Mr. Bishop's remark, unless the term "personal property" is restricted to that which is corporeal and movable—to chattels personal, strictly so regarded. If we break through this barrier, a work on personal property embraces nearly everything in the law except real property, and we find ourselves in a treatise on Personal Property in the midst of the law of Partnership, Joint Stock Companies, Stock in Corporations, Bills and Notes, Ships, Debts, Money, Insurance, Patents, Copyrights, Gifts, Sales, etc. And thus extensive, indeed, is the plan of Mr. Schouler's work; and all the subjects above indicated and many more are treated of by him. A plan so comprehensive and topics so important, intricate and complex, would require several large volumes if it were worked out into great detail, and accordingly the author has not attempted it. He deals with principles, and his work, especially

the first volume, is essentially elementary. Whoever reads it, understanding such to be its aim and character, will not be disappointed, and perhaps it would be difficult to find any book in which the outline and essential principles of the law of the topics considered are more satisfactorily presented. The book is an excellent one for students; and it is almost equally useful to the practitioner as a commencement point for investigations into many of the most important practical subjects with which he has daily to deal. In one respect we note an essential difference in the character of the second volume. It deals alone with the *title* to personal property, embracing the great and important subjects of Gift, Sale and Bailment, and these are fully, almost exhaustively, treated. Nearly 500 pages have been wisely given to the subject of Sales, and it is not, perhaps, too much to say, that the American law, as it exists to-day, is more fully presented here than in any other treatise. Mr. Benjamin's work—its comprehensiveness from an English standpoint, its merits and accuracy—is well known. It is a book the loss of which would be seriously felt. But it is not distinguished for completeness of reference to the American adjudications. In this last regard Mr. Schouler's work may well stand for its complement, and the two together will give the lawyer and the judge the entire law on the subject, or a clew to it. Gifts are considered with an almost equal degree of thoroughness, and it is our conviction that the three chapters of Mr. Schouler on *Gifts Causa Mortis* contain the best exposition of the law on that subject, full of intricacy and conflicting decisions, to be found in any elementary treatise.

D.

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I. CONTROVERSIES OF MODERN CONTINENTAL JURISTS.

IV. THE LAW AS AFFECTED BY SENSIBILITY TO WRONG. POSSESSION.

There is probably less difference between the views of Savigny and those of Von Ihering than might be at first supposed, and much less than the latter would seem to indicate. If the charge of fatalism, often made against the former, were well founded, that difference would be rendered more palpable; for the latter, while accepting the pantheism of Hegel, rejects the doctrine of immutable destiny, with which it is commonly allied, and lays great stress on the free initiative of the human will. In one fundamental conception their notions coincide in a rather unexpected manner. Both of these writers regard the law as the product of separate individual action having relation to concrete rights; and the thought of preparing a code of laws in the closet, for the government of a people, would be apparently as distasteful to the one as to the other. But a great deal depends on the spirit with which a doctrine is proclaimed, and a little increase or diminution of energy makes all the difference in the world. Neither of them seems to ask, or desire, that we should examine the law as a whole, with a view to making it a vehicle of any theory or philosophy; or, with a view to confor-

mity with any ideal standard of excellence or harmony. The one regards the law as a natural and inevitable emanation of society, which will be in its best and most normal condition when left to itself. Individual acts will unconsciously aggregate themselves into customs, and customs are laws which may not have attained maturity. The other traces the origin of the law, likewise, to separate individual acts; but as to the manner in which the spirit of these acts is to be transformed into the law, he is less explicit, though he expressly denounces custom as being a medium insufficient to accomplish the result. Yet, on the condition that every man will sternly defend his rights, the result will somehow be accomplished. In this respect, his faith is not less unwavering than that of his predecessor; indeed, it might be said to be more confident, since it disdains all consideration of the means by which the law is to be made responsive to individual acts. Both writers agree fully that the law is made up, in whatsoever manner, of the actions of individuals relating to things to which their respective and various rights attach, and not by a direct application of philosophy to a system of laws. It is on this idea, at least, that the reasoning of both authors is mainly founded.

The degree of vigor with which Savigny would have the citizen defend his rights, does not sufficiently appear. It does not precisely follow that, because he would have the law left to take care of itself, he would also recommend to the citizen to submit tamely to imposition and wrong. His system necessarily pre-supposes some relationship between the acts of men in this respect, as well as in all others, and the actual or progressive state of the law; but he leaves these acts to the discretion of individual members of the community—within the limits of the law—with the single admonition that they shall not, unless in exceptional cases, thwart or disturb the even course of the law's development by any intentional and direct interference. It is probable, indeed, that the spirit of the general doctrine of submission to existing institutions would descend to the details of life, and would recommend patience and concession under wrong—

delay, temporizing, forgiveness, and the hope of better things. These two writers would recommend different classes of virtues, which, though not opposed to each other, are rarely to be found highly developed in the same character. The one would favor amiability, kindness, charity, and all the virtues that have benevolence for a basis; while the other would inculcate the sterner duties of self-sacrifice and uncompromising zeal for truth, and hostility to every species of wrong. The ideal citizen of Savigny might not accomplish any tremendous good in the world, but he would be an agreeable friend and neighbor, and would do little or no harm; while the ideal citizen of Von Ihering would purchase the possibility of doing any great good by an extreme liability of doing a very great amount of harm. The latter would be a stoic; the former, an epicurean. As there is a certain coincidence in these theories, there is also a certain weakness which they have in common. We have endeavored to show that the notion of Savigny, that custom once embodied in the law can be changed by a new and opposing custom, is a fallacy; that when the law prescribes a rule, any one departing from it will pay the penalty of the law, and will be so far from invalidating the law that he will only afford a new illustration of its strength. By discarding custom as a means of communication between the citizen and the positive law, without falling back on legislation, Von Ihering only increases the difficulty. He tells us that if men will defend their rights with the proper spirit and resolution, the law will be forced into a proper relationship with those rights, and will be compelled to grant them recognition. And here the ambiguous German word which stands both for "law" and "right," and which leads to much ambiguity of thought, becomes doubly ambiguous. If the author has reference to legal rights, it is obvious that where a right is definitely provided for by law, it will not depend on the number of law-suits for its extent or character. My legal right to my horse will not be affected to any extent by the number of law-suits involving titles to horses, that may be brought next year. If, on the other hand, the author refers

to moral rights, which are not—but ought to be—recognized by law, it is equally manifest that the mere assertion of them in hopeless law-suits would not of itself change the law. If it is meant that these fruitless law-suits are a method of influencing public opinion, which will in its turn act on the Legislature, it need only be said that the method is precarious, and is unnecessarily circuitous and expensive.

When Robespierre ascended the tribune for the last time and looked down on his revolted slaves, who were his intended victims, the sudden approach of death filled him with dismay, and brought to him an inspiration to which his whole life had been a stranger. For a moment he was unable to speak. He could only utter coarse and inarticulate sounds. A deputy exclaimed, "It is the blood of Danton that is choking him!" The doomed Dictator, gathering himself for a last defiance, cried out, "Is it Danton, then, that you regret? Cowards! why did you not defend him?" With this dying retort the tyrant broke his fall from more than imperial power to the easily accessible level of a scaffold.

We cannot but wonder whether this tremendous passage of history occurred to Von Ihering in writing the treatise which we have mentioned. Any way, the theme is the same, only very much elaborated. Whoever permits, or does not resent, an injury or a wrong, makes himself a party to it; not only a sharer in the guilt, but a cowardly accessory in crime. There must be a certain degree of truth in this, or else the response of Robespierre would only appear to us to be an unmerited insult; but like every other truth, it has its own limitations, and is susceptible of too wide an application. The duty of resenting promptly, persistently and effectually, if possible, every invasion of our rights, is placed on the elevated ground of self-sacrifice to the good of the community; if placed elsewhere, it would necessarily degenerate into a mere pursuit of self-interest or self-gratification. To prevent that degradation, we must sink all selfish feeling as much out of sight as possible, and purify and ennoble the passion of resentment by a constant regard for the ideal

reign of right, and the permanent good of our fellow-men—to be attained by a prompt punishment of wrong whenever it makes its appearance within the sphere of our personal activities.

But there are cases where the very suspicion of any selfish motive would be necessarily excluded; where the sentiment in question might be displayed under circumstances which would forbid the common and too ready reproach, that the person who resents is governed by his own interest, for the advancement of which he uses the public good as a cloak. If we are to resent injuries done to ourselves under the influence of a hearty and courageous duty to society, why should we stop at that? It is as much to the advantage of the community that the wrongs of others should be redressed, as our own; and an effort made in one case to resent an injury will go as far to maintain the true rule of right as if made in the other; only, the sacrifice made in resentment to an injury done to another would be a more unquestionable evidence of devotion to principle, than if we had some private interest involved in the issue. No one can doubt that there is something nobler in performing a duty to the state in the interest of another, than in the pursuit of our own material welfare. Yet, if we followed this argument to its legitimate conclusion, we should actively take sides with every suitor—with every one whom we might suppose to have a wrong to redress; we should become stirrers-up and promoters of strife, and should be liable to be proceeded against as common barrators. The induction would, therefore, seem to be a little too rigorous. Supposing Danton to have been innocent, the reproach of Robespierre was just; because it was addressed to those who had an official duty to perform, and who held the power of life and death; but if it had been addressed to a detached spectator, it might have lost its point.

To the theory thus announced, M. Vainberg has lately made an interesting reply¹. We think it but just to give the main part of his criticism in his own words. He says:

¹ *Les opinions modernes des allemands, sur la notion du droit; par S. Vainberg, Docteur en Droit, Avocat a la Cour de Paris. Paris, 1875.*

“According to M. Ihering, the law is only a question of sentiment, a question of character, and whoever abandons his right is a coward; that is to say, whoever neglects to bring a suit commits a treason, not only against his own person, but against the public welfare as well. Consequently, the greater the number of law-suits in a country, the more the sentiment of right in that country will be developed, because the different members of the community keep up a more energetic combat against injustice. According to M. Ihering, the man of honor who is injured, or who thinks himself to be injured, should sacrifice his entire estate, and repel with indignation all attempts at conciliation; for in accepting any compromise, he abandons the ideal question of justice in favor of a sordid calculation of interest. In accepting any arrangement, he becomes himself dishonest, for he lends a hand to injustice; he encourages rascality and bad faith; he is incapable of any noble and generous action; and a nation composed of such members is forever lost. Observe that the author is very careful to avoid any precise definition of right; for him, as I have said, right is a pure question of sentiment, like love or hatred; and as soon as one believes that his rights have been invaded, he should be ready to make any sacrifice in their defence. This belief alone should decide as to the material existence of the individual; and for that alone he should impose on himself heavy burdens.

“If M. Ihering had descended for a moment from the elevated sphere of his theory, to be present at the practical spectacle of daily life, we are persuaded that he would never have put forth such a proposition. Let us look at daily transactions. Does any one bring a suit without a firm conviction of the justice of his cause? What lawyer is there that has not heard his client complain of the iniquities of his adversary? These are stereotyped phrases. And if by chance the suit is lost, the client will accuse his lawyer of incapacity; the court, perhaps, of partiality; but his right will be beyond discussion; his right will be as clear, as legitimate, as the divine justice.

“The theory of the Professor of Göttingen is as dangerous for private right as for public right. Suppose an individual having a conviction of his right that cannot be shaken—a conviction that the different courts do not share—and who can not obtain by legal means the recognition of what he calls his perfect right. Following the theory of M. Ihering, the response is not doubtful. The man who believes firmly in his right should sacrifice everything for it. He should then demand justice by the *ultima ratio*, by his own strength. He should take up arms against a judgment that he believes to be iniquitous. If every one who has lost a suit should follow the instructions of our author, what would become of the existence of society, and the safety of the state? But let us render our opinion still clearer by means of another example.

“Let us imagine a suitor prosecuting an undoubted right that, through a combination of circumstances, is lost in the courts of various jurisdictions—and we know that the best cases may be lost. The losing suitor submits to the judgment. Does the right, from this simple fact, cease to exist? Can the opinions of the different judges abolish the immutable notion of right? We think not; and the proof is found in the doctrinal variations of jurisprudence.

“The idea of right, then, does not depend singly on individual belief; it is not a pure question of sentiment, changing with time, country, vocation or character. The principle of right is, above all, the result of reflection; not individual, but human reflection. The analogy which M. Ihering seeks to establish between two nations and two parties to a lawsuit is without value; the example is ill chosen; for such a comparison is impossible. A nation fighting for a league of land despoiled from its territory combats, in effect, for its existence and for its national honor. If it is vanquished in this just war, victory establishes no right against it. It succumbs merely to the oppression of force. Victory of arms is not the result of human reflection, but it is the result of hazard and brutal force. But in the suit of the farmer for a few feet of land, on the contrary, the judgment rendered by

the competent jurisdiction creates a right, resulting from human reflection, guaranteeing the public safety. Between the wars of nations and litigations of private right there is no analogy. In the case of private right, the result of the suit is foreseen by the prescription of the formal law; in the contests of nations, the result is unknown; it is abandoned to the uncertainty of hazard. And, unhappily, experience instructs us that victory is not always on the side of the right. What would M. Ihering say of a nation too feeble in number, or insufficiently prepared, going to war for a league of land against a powerful neighbor? Would he advise it to undertake the struggle? We have too good an opinion of the judgment of the Professor of Göttingen to believe it. Still, in the domain of private rights, there will always be a miller at Sans Souci to resist even a king as powerful as Frederick II, who may wish, arbitrarily, to destroy his mill.

“Private right is limited within a sphere that is precise and determined; and hence, its results are almost always certain. In a well-organized state, such as the greater part of the states of Europe, the principles of law are equally fixed and categorically established. It is not the law that varies; it is the opinion of its application. Thus, to remain within the series of examples given by M. Ihering, the law of property is juridically formulated in our code. Every attack will hence be defended by the law, and the protection thus afforded will be especially invoked by the tiller of the soil, since it is he that has the sentiment of property the best developed. But where M. Ihering sees only a good, we see the greatest danger for the existence of society. It is to be feared that the tiller of the soil, too susceptible in his sentiment of property, will permit himself, by a simple supposition of bad faith on the part of his adversary, to be drawn too easily into an exorbitant expense, that will lead to his ruin. Every one who begins a suit ascribes bad faith to his adversary, and also feels a consciousness of right. This is a general rule that is confirmed by experience. There is no one in the world that does not pretend to know, or, to use the expression of M. Ihering, to feel, his right. The law, they all say,

is good sense; is the sentiment of justice. And as each attributes to himself good sense and the sentiment of justice, he attributes to himself at the same time an exact knowledge of what is law. He is only ignorant of the fact that the notion of law is not the result of individual sentiment, but is truly the general result of human reflection. The law, above all private law, is not the product of sentimentality; it is, on the contrary, the product of pure reason, resulting from the application of philosophic speculation to the materiality of facts. It is on this account that the husbandman may understand his right, and that he exposes himself, unless he takes counsel from a man of the law, of engaging in a suit, the issue of which may be unfavorable to him. We think that the less susceptibility he shows in such case, the less he assumes bad faith in his adversary, the nobler his sentiments will be, the higher will be his notion of justice; for one having a knowledge of law, and, consequently, an exact sentiment of legality, will avoid law-suits as much as possible, and will be a partisan of conciliation. In actual life lawyers have very few suits of their own to discuss; and modern legislation tends justly to diminish the number of law-suits, and to augment the means of conciliation. We have only to recall the attempts made to enlarge the jurisdiction of justices of the peace, of arbitrators, etc., which show that a great number of law-suits is not considered a proof of a greatly developed sense of justice among a people. We think, with the great body of jurisconsults, and with public opinion, that a considerable number of law-suits in a country indicates rather a diseased condition—an abnormal condition—the issue of general discomfort; while conciliation denotes the pacific spirit of a nation truly civilized, having a knowledge of its rights and the sentiment of justice. A man who has many law-suits is not, on that account, either an excellent patriot or a courageous soldier.

“What we have said of the tiller of the soil applies equally to the military officer. In what M. Ihreing says, there remains a reminiscence of the student of the German universities. He measures honor by the number of scars that the students

make reciprocally in their semblances of duels. We are but little touched by this trenchant reasoning. The officer by the insolence of his character, in placing his reason at the end of his sword, does not convince us of his right; the most that he shows us is, that he is willing to add infamy to an act of injustice. A swash-buckler is not a man of honor simply because he can handle arms better than myself. Susceptibility, greater or less, proves absolutely nothing as to the development of the sentiment of right. Moral irritation is most frequently produced by physical irritability; and a too rapid circulation of the blood has certainly nothing to do with the notion of right.

“The typical Englishman that M. Ihering refers to as a model, in resisting the exactions of the inn-keeper and the coachman, preferring to expend a hundred-fold rather than pay a sum improperly demanded, remains for us an exception, having no connection with the truth of facts. Commonly, the Englishman is too much of a gentleman to discuss the insignificant value of an object. For the rest, the conclusions derived by M. Ihering from this resistance are purely arbitrary. We contest the proposition that the English possess a more developed sentiment of justice, a greater respect for property than other people. The civilized nations of Europe perfectly sustain a comparison with them. Statistics show us that the most frequent crimes in England are attacks on property; that is, crimes committed from covetousness and cupidity; while in France the most of the crimes are produced by a false sentiment—by passion, love, hatred, jealousy, etc.

“I believe that I have shown that the argument of M. Ihering is destitute of all serious foundation. His system is only an edifice artificially combined, to which we do not deny a certain subtlety, but which evidently lacks all logical spirit. His theory, we have said, is dangerous and fatal, not only for private law, but also for public law.”

After this, M. Vainberg makes an attack on the argument of the German professor based on political considerations. He discovers an effort to justify the dismemberment of the

French Empire, under the mantle of a philosophic enquiry. The Germans had a strong sentiment of their right to Alsace and Lorraine; they vindicated that sentiment by force of arms, and the sentiment was sanctioned by the success of war. Thus the right was established beyond dispute. We should hardly expect a Frenchman to yield in debate to the force of this reasoning; to him, this is merely the consecration of might. One claims a thing, and he succeeds in getting it by force against a weaker adversary. Doubtless he will be willing to cut off discussion at this point; but an accomplished fact will not prevent a review of the moral rights of victor and vanquished. That question can never be settled except at a distance from the smoke of battle, in the silent courts of conscience, by reference to principles of justice, concerning which there is less dispute than there is about the existence or operation of many physical laws. We can hardly expect a German and a Frenchman to keep quite cool when the discourse turns on Alsace and Lorraine. That is a painful subject; the great international ulcer into which all other sores run. And yet M. Vainberg exhibits rather a commendable moderation; though we suspect that his surmise, that the professor wrote with a political object in view, may be unfounded.

It might hardly seem to be fair to suppose that Von Ihering counsels open revolt for every suitor who has lost a cause that he thinks that he ought to have gained; and yet we do not see how that conclusion can be expelled from his argument. If it is the highest duty of a man to resent an injury, so that he may deter men from the commission of injustice, and thus lessen the amount of wrong that prevails in the world; if, in the pursuit of his right, he cannot, without baseness and moral dereliction, stop for a moment to count the cost, there will be no excuse for him if he fails to pursue his ideal object to the last limit that can possibly be attained. Why should he stop at revolt, or any other thing, when the ever-sacred cause of Right is involved? Does not the soldier fight all the way up the rock of Gibraltar, surrounded by suffering, danger and death, for a six-pence, when a hack

driver would charge you twice the amount for carrying you half the distance? What is this uneasy life, with its false hopes and fears, its poor delights, the heart turning painfully on its axis, compared with the lofty conception of duty?

To all these questions there is an answer perfectly adequate, though by no means satisfactory. It is, that human virtue, though not repulsive like vice, is, after all, commonly quite a homely kind of thing. Most of life is prose, and not poetry. The sternest duty does not command us to sacrifice our estates, our lives, our families, in pursuit of an ideal good, however true may be the principle that underlies it; for virtue, as well as everything else, is bound in the hard bonds of practical life; she, too, must take note with a wary eye of times and seasons, and descend from the lofty perch of speculative theory, and make a sordid and ignoble study of chances. Why should a man blast all his prospects in life, sacrifice life itself, bereave those who are dear to him, because some miscreant has committed a slight trespass upon his property? If he is a man of sense, he knows full well that a fruitless revolt will only rivet the chains of despotism more securely; that an unsuccessful law-suit will do nothing to strengthen the right for which he contends. He will not only consider his injury, but also the state of his proofs. He may have a world of resentment, and not know a syllable of the *Corpus Juris*. He will, therefore, go to a lawyer, who has made that a study. He will carefully consider the chances of success or defeat, and will act accordingly. This is all very tame and spiritless; a vile compromise with the inevitable. Here is a base desertion of right—the man compromises with injustice; he is a slave and coward. This would possibly be true, if the question could be completely insulated; but in this life, questions are not generally singly presented. Besides the particular right which has been invaded, the injured party has other rights that he must protect—the rights of life, liberty and property. To sacrifice these in a petty contest, about a matter involving some trifling amount, would consist neither with wisdom nor duty, even though he could console himself with the reflection that he was pursu-

ing some ideal notion of right; about which, indeed, he need not concern himself over much, for the conception of right, the ideal glory that he seeks, was perceived from the beginning of the world, and will continue in undiminished splendor infinitely long after he shall have ceased to exist. One may certainly be directed by the stars, and yet pay a due attention to the obstructions that incumber his immediate pathway.

It is no doubt true that if A should spend all his estate in apprehending and punishing a trespasser, he might render the premises of B less liable to be trespassed upon, and might do the state some service; but yet, in this world, B is expected to keep a watch over his own property, and the state has no right, under ordinary circumstances, to expect that the citizen will sacrifice his all in deference to some dream of the common good, or even the common good itself. The doctrine is but an offshoot of that altruism that teaches that every man should neglect his own interests in order to look after those of others, regardless of the fact that each best knows his own wants, and can best provide for them, and that the doctrine of complete and habitual self-immolation leads to no general prosperity, but is full of cross-purposes, perplexity, dissatisfaction and disappointment. But this new species of the doctrine is destitute of the spirit of benevolence, on which it is usually made to rest, and is called on to act in obedience to the commands of resentment.

It may be admitted that it is the sense of a wrong suffered, or of probable or fancied injury, that lies at the bottom of all law; and yet, it is not true that it is the active resentment against injustice that hardens into legal principles and establishes the legal order of life. It is, indeed, this resentment, for real or fancied injuries, that makes lynch law and the duel; but these are not law at all; they are simply the end and overthrow of law. The law which is thus overthrown and trampled upon is not the product of the transient feeling of resentment, but of reason that observes all things, and perceives in this common passion of resentment only one of the factors that enters into the solution of a many sided

problem. Theft creates resentment. The reason is, that it is a violation of the principles of natural justice, and the law is modeled on the principles thus called in question, and not specially on the resentment which it may produce. It is true that there will generally be a greater resentment of an act of gross injustice than that of one of trifling injustice. That is the natural effect of the sentiment of right. We are more shocked at a great crime than at a petty one. This is not an unaccountable manifestation on which the law is based; it is only one out of many evidences that justice has been more extensively violated in the one case than the other. That the law should keep in view principles of justice, and not the depth of the tide of resentment, is transparent. There was a time in England and Scotland when a particular religious ceremony, perfectly reverent and harmless, would cause a deeper and more general resentment than almost any crime known to the law. This feeling had its effects on the law—effects profoundly to be deplored. The legislator based the law on that sensibility which our author contends should be the measure and foundation of all law. It is true that a vast display of sensibility is apt to have an effect on legal rules; but this tendency is one that is sedulously to be guarded against. To say that the law is founded on sensibility, is to refer people to passion as a guide, and to distrust that calm and sober reason that should continually pervade and animate the law; to reduce the law habitually to the pathological condition into which it often temporarily falls in times of revolution and violence. . To say that the law is emotional, and not logical, because it is an emotion that first teaches man the need of laws, is about as correct as it would be to say that the science of mathematics is emotional, because men engage in its study from a passion for knowledge.

This we take to be the truth on this subject; but it is not quite the whole truth; and the rest of the truth lies on the other side, and is entirely too small to support the mighty superstructure of theory that has been so ingeniously built upon it. But such as it is, let us state it fairly; for we can not say, with M. Vainberg, that the theory is destitute of all

foundation. There is a certain duty resting on every member of a community to aid in the enforcement of the laws. The precise extent and obligation of that duty cannot be defined by any general rule; but because it cannot be thus defined it is not, therefore, boundless. It must depend to some extent on the situation of the parties, and all the circumstances of the case. The duties of juries, and of all persons acting in official position, are marked out with sufficient clearness. But their duties must be supplemented by the voluntary activity of private citizens. It is true that private citizens are often apathetic in such matters. The law makes a note of that fact, and seeks to provide a proper stimulus. It offers rewards for the apprehension of criminals; it divides a penalty with the informer; it makes it a crime to compound a felony. By these, and such like means, and the maintenance of criminal jurisdictions, grand juries, public prosecutors and a police force, the state endeavors to preserve in its integrity that part of the law most essential to be preserved, and which would otherwise suffer and be impaired from the supineness of the private citizen. If it were necessary, doubtless the law would go further; but it is not necessary. The force of resentment for private wrong has been adequately tested by long experience. It is known with sufficient accuracy how far it may be trusted, and the laws are disposed accordingly. That its activity will extend over a wide field is well known. Self-preservation is indeed the first law of nature. Men are generally sufficiently tenacious of their private rights; and excessive gentleness and meekness, though occasional sins, are not commonly the prevailing sins of the race. The trust is not ill reposed. There can hardly be a doubt that, with all our oaths of office and official bonds, the duty of defending private rights is much better performed than official duty—just as men attend more assiduously to their own business than to the business of others. Every lawyer knows that one of the most difficult and thankless, and yet one of the most imperative duties of the profession, consists in keeping down passionate and useless litigation. The client comes to him with

a burning desire for revenge, having a good case, if ever there was a good case; and to his confiding nature it sounds like a reproach and an accusation to be told that he has no case at all. The best lawyer may mistake the law, a poor lawyer is almost certain to do so, the dishonest lawyer will inflame the impetuous spirit of revenge that goads his client to litigation. It follows that instead of there being too few law-suits, there are, or there is danger that there may be, on the whole, too many; there is an excess of resentment, leading to a waste of time and money, perpetuating ill-feeling and promoting discord. At this point the law intervenes in another direction, in order to break the force of a resentment that in a moderate degree and in certain cases is useful, but which produces a balance of evil by its excess; and it expressly favors compromises, arbitration and family settlements. The passion of resentment for a wrong may indeed be compared, as was said, to that of love, that develops itself suddenly and burns with a fierce and unrelenting heat; but, like the passion of love, it may spring from improper motives; it may be fixed on unworthy objects, or objects beyond its reach; it may be blind, and may bring ruin and destruction in its train; of itself it is no guaranty of wisdom, or virtue, or truth in its possessor, or of moderation and justice in the means by which it will seek to accomplish its ends.

Doubtless there are cases where the vigilant and persistent resentment thus preached is demanded as a duty. Doubtless resistance to tyrants is obedience to God. And, without resting on such an extreme instance, it may be said that an active resentment of official injustice will have a very happy effect in quickening the sense of official responsibility. It is sufficiently evident that if every man would stand firmly by his rights in such cases, extensive plunder by officials would be rendered impossible. In such case, too, the individual would have the moral support afforded by the consciousness that, in resisting a petty exaction, he would be fighting the battle of the community at large; a consolation that must be somewhat remote and weak when he resents some trifling offence committed on his rights by a private citizen.

There are cases, also, where a sense of duty will demand the most ruinous sacrifices; where one must simply die if need be, and ask no questions; where the soldier must give up his life, leaving his widow and orphans to the country; where the martyr must clothe himself with his "shirt of fire." In such emergencies, the doctrine of the German professor is perfectly true, and is not without foundation. In such cases, too, the motive will hallow the act. The war in which the soldier surrenders his life may be useless and unjust, as most wars are; but if he had no hand in bringing it about, that circumstance will not stain the glory of his act. The martyr may have died for a theological abstraction; but as it was vital to his principles of faith, which, on the whole, tended to the benefit of humanity, the crown of martyrdom cannot be denied him. But it is no less than an egregious error to make of these exceptional cases a rule of conduct for the ordinary affairs of men; it is to mistake the dignity of the occasion that demands or justifies such a sacrifice.

Without seeming to make light of views seriously put forth, and no doubt seriously entertained, it might be suggested that this doctrine has been exhaustively treated by a man of great and singular genius. He perceived that an excess of virtue is a vice; he detected the lurking ridicule that is concealed in a too lofty aspiration; and recalled virtue to her homely and useful toils on the surface of the earth, among common men and women. He had lost an arm at the battle of Lepanto, and he passed through a life of poverty and neglect to the belated reward of posthumous fame. He had felt the enthusiasm of the soldier, and doubtless the resentment caused by wrong, contempt and insolence.

"Cervantes smiled Spain's chivalry away,"

and with it the greater part of the philosophy of which we speak. Don Quixote possessed natural resentment for oppression and injustice in a high degree, and there was no ignoble element commingled with it. Leonidas and his three hundred died for the liberties of Greece; but the knight of La Mancha was willing, at any time, to pour out his

blood like water in defence of the humblest victim of wrong. He possessed the generous consciousness that he was doing a service to his country, and to the world at large; a consciousness that sweetened his labors and lightened his heavy, immeasurable burden of duty. Yet, he brought no practical good into the world; on the contrary, much harm. He released an apprentice from the hands of a cruel master, and punished the latter for his cruelty; but when he was gone, the master whipped the apprentice ten times more than at first he intended. Thus, in almost every instance, the pragmatistical interference of the knight, governed by the best motives, only aggravated the ills which he sought to redress. His virtue was of so pure and unselfish a character that men called him mad; and mad he was, beyond the possibility of a doubt. And yet he fulfilled in himself all the conditions of good citizenship as contended for by Von Ihering; resenting injustice profoundly, without reservation, that the wicked might be punished, and that the rest of mankind might have peace.

The law is so intimately and inextricably interwoven with morals and the elements of human happiness, that any false theory of law has a tendency to make men morally worse, or more wretched. We have need, therefore, to examine the speculative consistency of a theory less closely than its practical effects. Plainly, Savigny's theory, if persisted in, would have fettered the human intellect, and would have consigned mankind to perpetual slavery. That of Von Ihering seems to us to be even more fatal, as encouraging evil passions and endeavoring to give them unending duration. It is true that a man cannot sustain his moral being without continual exertion, but there is usually a sufficient exertion in the chastisement and discipline of passion; and with most men, and under most circumstances, it is easier to resent than to forgive. If, however, in any given case the situation is reversed, it may well happen that a sense of duty may require us to sacrifice our comfort for the public good, and it may be that this duty may be as imperative as it is painful; but the cases must be carefully discriminated. If the feeling of outraged

sensibility were only excited on just occasions, then very general maxims might be applied; but where men have one real grievance, they have a thousand that are only imaginary. An unfortunate expression, a moment of forgetfulness, a cold look, will suffice to break off friendships, and to lead to long estrangement, perhaps to a life-long enmity. There is generally nothing at the bottom of the animosities that disturb the peace of men and wear out so many hearts, but some unlucky misconception. Hatred, like love, is blind. A nearer acquaintance with an enemy will usually reveal, at least—if nothing better—such a strange blending and confusion of virtues, weaknesses and vices as will puzzle the understanding and suspend the judgment. Under all the circumstances, we cannot doubt but that it would be far better if a little more charity should leaven the lump of human infirmity. We are far from concluding that it is the duty of men to tamely submit to every insult, wrong and outrage; nor is there much room to fear that men will usually do so. And there is great reason to believe that the gospel of resentment should be preached with caution, and only as occasion may require; though no one can doubt that proper occasions do really exist.

The reference to Shylock must be regarded as particularly unfortunate; for no one can doubt but that it was the duty of the rapacious Jew to compromise on the fair and liberal terms offered by Antonio. He claimed the measure of his bond; for the breach of it, he felt the natural legal resentment of the usurper; but that resentment, so far from being a sentiment of unerring truth, serving as a basis for the immutable principles of justice, was darkly mingled with his hatred of the Christian.

The argument that injuries should be generally resented, lest some part of the law should fall into decay, is too far-fetched to merit any serious consideration. A law that continues to be of any practical advantage to a community can not fall into decay. Nor is even a law that is not acted on quite the same as no law at all. It may be acted on at any time hereafter, and may have an influence on the subsequent

development of the law. It may, also, have a persuasive and preventive effect. It would be better for the community, of course, if no more demand were made on any law.

But Von Ihering's treatise is particularly noteworthy, because it is obviously an attempt to bring legal philosophy into a line with the latest phase of scientific thought; the only attempt, so far, that has probably been made in that direction. His very title, "Struggle (combat) for the Right," would seem to be a reminiscence of Darwin's "Struggle for Existence." Mr. Buckle spoke of uniform "laws." Had he used the word "forces," he would have spoken the language of the new science. It has long been an effort of philosophy to find some simple, uniform cause for all the various manifestations of which we are conscious; some single fabric on which every visible figure is wrought. Lucretius, and the epicureans generally, found that the universe was made up of like atoms in varying combinations. The alchemists sought the absolute substance, that, under varying manifestations, would re-produce everything known to us. To the same end Spinoza resurrected and amplified the doctrine of pantheism. Modern science relies on the doctrine of invisible forces. Substance is made up of centers of forces—the mind is a force. The discovery of the commutation and persistence of forces has gone a long way to spiritualize our conceptions of the universe. It has had an effect on every province of thought which is the most distinguishing characteristic of the time. It has changed the style of history; has invaded criticism, expelling the former artistic style that perceived everything in a state of repose; it pervades the modern novel; it is even apprehended that poetry has disappeared before it, just as the epic disappeared long ago in the clearer light and more confined spaces of modern life. The application of this philosophy to law and to sociology has been felt to be a severe test. Mr. Spencer has attempted it in the one case, and Von Ihering in the other. It is, perhaps, too early to judge of the success of the former, as he is still at work on his task, which, so far, does not seem to be very hopeful. The treatise of the latter has had an exceed-

ingly rapid and wide circulation; but we do not perceive that it can be said to throw much additional light on the topic of which it treats. It is doubtful whether, by merely calling the influences on which the law depends "forces," we shall add anything to the sum of our knowledge.

There is a difficulty in the discussion of the elements of the law, government, morals, and everything pertaining to the science lately called sociology, that has long been seen and felt, and that will be seen and felt forever. We endeavor to apply to the motives that decide human conduct rules as regular and decisive as those that prevail in the physical world. We do this in order to build up a system that from given premises we may predict certain results. But the hopes, aspirations, fears, remorse, love, hatred, revenge, and the thousand emotions and passions that move or transport the souls of men, are too uncertain, obscure and varied for our definite apprehension. We may, indeed, make a few conjectures, and even state some general principles; but the sphere of our observation is still clouded with gross darkness. Hobbes and Spinoza, yearning for some method that should confine philosophy within the iron chains of mathematical certainty, cashiered sentiment as a disturbing element; made of the questions that control the moral and intellectual world, mere problems of geometry; described the sea as if it had neither winds, nor waves, nor tides, nor ships, nor floating wrecks, nor moving inhabitants of the deep; as if it did not alternately reflect the quiet sky and the melancholy clouds; in short, as if the sea were destitute of change or motion. They described a sea that was never seen; and hence, their descriptions could be of little or no utility to any mariner.

But the later school of philosophers take the other horn of the dilemma. Seeing that the varied impulses of humanity cannot be discarded from any consideration of human institutions without destroying the value of any result, they predicate of these impulses certain fixed principles and unerring rules—seeking to bind the human will in the bonds of theory. This is perhaps even worse than the other; for it in-

volves an impossibility. It is quite useless for Mr. Spencer to tell us that every aggregation of things must take its form from the character of the units of which it is composed; that cannon balls can only be piled in pyramids or wedge-shaped heaps; and that every community is made up of the individuals that compose it, and is only the sum of their various qualities. The physical illustration, any physical illustration, is more apt to deceive than to instruct. From the certainty of physical laws we are asked to infer the certainty of moral laws, which is the very thing in question. Men are not cannon balls. There are no round men, and there are no square men. The same man is sometimes round and sometimes square; round respecting one thing, square respecting another. He constantly undergoes such changes, from his natural progress in life, and a thousand circumstances internal and external, as surprise himself and confound his acquaintance; and in the different periods of his life he travels quite beyond recognition; moreover, the fugitive units continually disappear, and are replaced by others that are dissimilar. If we could suppose the cannon balls to undergo corresponding changes, what would become of the wedge or pyramid? We may call the mind, sentiment, passion, or impulse of mind, a force if we see proper; but we need not be misled by a metaphor. Physical forces, the most subtle, may be weighed and measured; their momentum and velocity, their direction and effect, may be calculated, generally, with tolerable or absolute certainty; but no man has yet fathomed, or invented any gauge to measure, the sentiments and passions on which individual action depends. To suppose any trustworthiness and uniformity in these sentiments, is to ignore the innate weakness and variability of man; and to base any philosophy of law, revealing itself in uniform rules, on a passion so capricious as that of resentment, would seem to be the most hopeless of all tasks. Our reason is given to us, not that it may be guided by the passions, but that it may discipline and control them; and in the accomplishment of this work, it finds in the law one of its most valuable and enduring agencies.

On another ground of difference between Savigny and Von Ihering, we conceive that the latter is not altogether right; that the former is not wholly wrong. Von Ihering regards the existing state of the law as being the precipitation into legal rules of the residuum of the legal sentiment, resulting from legal conflict in the contention for public and private rights, the net result of the moral struggle, the equivalent of spoils in war. Personifying the forces by which the law is produced, he regards the law as a purely passive instrument. When there arises a contest as to the displacing of an existing law by a new law, it will be decided by the interests of the various parties actually present in the contest; and the existing law is not preserved by any *vis inertiae*. Now, this certainly is not true; and it is not a little singular to find one who builds the foundation of the whole law upon sentiment, referring the question of the perpetuation of law to interest alone. There is a certain amount of truth at the bottom of the theories of the historical school. Existing law will surely stand until it is attacked, and, when it is attacked, it will be apt to find defenders. Antiquity is revered for itself; old institutions are respected; a fact that explains the reason why laws continue in force long after they have lost their usefulness, and even after they have become injurious. Let us suppose a person of a peculiarly active and organizing mind. He joins with others in the formation of a corporation; he takes the initiative in everything, draws up a constitution and by-laws, gives a definite direction and form to the corporate existence, the other members passively assenting. But let the same man become a member of a company that has had a long and successful life, having its immemorial statutes, and regulations, and customs; in such case, he will not be able so freely to communicate the impulses of his own mind to the corporate being. The old members will stand on the beaten track; they will object to new notions; they will vote adversely to every proposed innovation. That this is the result of custom and established usage, to a very great extent, in the majority of cases, cannot be denied. Thus it is, too, that laws long

established acquire a strength of their own. Their merits are not canvassed every day; filial piety demands that we should respect the institutions of our ancestors; and there is a kind of sacrilege in attacking the venerable relics of the past. It is useless to tell men that their ancestors were not necessarily old men, nor possessed of supernatural wisdom; that the circle of human knowledge has been greatly enlarged since their time. For it is to be observed that the world has, perennially, the appearance as if it were just going to the dogs in some direction. That it has not done so in the past, we ascribe to the institutions that preserved it from anarchy and destruction; not recognizing the fact that there is a perpetual and mysterious influence that weakens human power when it becomes strongest, and strengthens it when it becomes weakest; and that, in the long run, men will say that it happened all for the best, not knowing exactly what the best might have been.

The past is a part of our existence; we cannot dis sever it from us. Sometimes men and women of great genius, of whom Lord Byron and Lady Hester Stanhope may be taken as examples, have endeavored to cut away the past; but almost uniformly, with mournful and disastrous results. The French people, during the great Revolution, endeavored to do so; but, finding nothing beneath them, they clutched helplessly and convulsively at the impossible antiquity of Greece and Rome, and renewed the mockery of a pagan worship. Nature opposes moral as well as physical restraints to the wanderings of the human will. Utility also comes in for its share of the work of rendering a certain measure of stability to the affairs of life. Men are not willing to give up laws that are familiar for those that are new, and that must be learned with labor, and expounded with doubt and uncertainty; nor are they willing, gratuitously, to impose this labor and discomfort on others. Besides, the efficacy of laws consists, in a great degree, in their adaptation to the habits and temper of the people whom they are to govern; and this adaptation is best secured by the permanent enforcement of the same laws, having for a result a harmony of manners of

life and law; a habitual reference to the same laws, having the effect to build up a mood of thought and act akin to the instincts of nature. Moreover, there is a sentiment, wide, and vague, and potent, that binds us by the chains of affection to things known and familiar. Familiar faces and familiar scenes are, in themselves, no better than other faces and scenes; but they are dear to us partly because they serve to fence us off from the oppressive sea of the unknown, where everything is suggestive of ignorance, helplessness, experiment, and probable calamity that cannot be measured. And the same sentiment necessarily connects itself with the laws, which affect, for good or evil, all the interests of mankind. It is, therefore, not true that the doctrines of the historical school of jurists are wholly false. They are based on the essential elements of humanity, on the necessary routine and discipline of life, the most enduring instincts of the human heart. Every new law bears a relation to the old law and grows out of it; and hence, we speak of the development or unfolding of the law; and hence, Mephistopheles scornfully compares it to an hereditary disease that is bequeathed from generation to generation.

This would seem to be the proper place—in conclusion of these papers, that have already been extended beyond the first intention of the writer—to notice the controversy between Savigny and Von Ihering on the question of possession. Mr. Austin has spoken of the work of the former on possession, as being the best law book ever written; but if he had lived to see the work of the latter, on the same subject, he might have been led to qualify his praise. For there is no doubt but that some of the positions taken by him have been overthrown. It is a striking instance of the difference in the development of the Continental and English systems of law, that while there have been published in Germany more works on the subject of possession than on any other legal subject, we have not, it is believed, a single treatise devoted to it. How the law ramifies itself into questions of actual and constructive possession, holding and occupation without possession, possession with and without title, vicarious possession,

united possession, possession in common, and so on, and what strange and perplexing examples of all these occur, may be guessed at by any one who will read the two pages which Bentham devotes to the topic. The importance of that branch of the law cannot be denied, as it is connected with every species of ownership, underlies the law of possessory actions, and torts to property, and a great part of our law of limitation of actions, the law of liens, and to some extent affects our system of registration of conveyances, and the law of fraudulent and illegal conveyances.

A well-considered treatise on this subject is, with English and American lawyers, a desideratum; and it has, perhaps, been only so long delayed on account of the difficulty of the subject. As the very title is commonly wanting in our indexes, the labor of gathering the scattered fragments of the law and combining them into a proper method would be unusually great. The state of the authorities on the subject is believed to be far from satisfactory; and the mere bringing of them together could not but conduce to the expression and unfolding of more accurate and more harmonious rules. And yet, such is the difficulty of the task, that it will probably be a long time before it will be successfully accomplished, notwithstanding that the subject necessarily lies at the very foundation of the philosophy of the law.

So many German writers had devoted their pens to the law of possession, that when Puchta finished his labor on that subject, he left his everlasting malediction against any one who should ever afterwards write anything about it. No curse was ever more unavailing. Books on the subject have continued to increase with something like arithmetical progression, and it has been drenched with legal and metaphysical speculation. Profound views have led to a subterranean darkness where the intellect feebly gropes its way, but scarcely continues to live. Let us frankly acknowledge that we are human, living along the surface of things; and that whatever we do not see somewhat superficially, that we shall not see clearly. But besides the deluge of metaphysical enquiry, these treatises abound in astute and refined criticism

of the Roman law; an attempt to examine which would be out of place here, even if the writer felt competent to do the subject justice.

Possession seems to afford the only instance where the law protects a fact, and not a right. Of two persons to a fraudulent contract, the law will grant relief to neither; but it will protect possession, however acquired. And a wrong-doer may defend himself against another wrong-doer, by merely showing his possession—that is, a fact, and not a right—and the law is content. Is there any virtue in the mere naked occupation or prehension of property, the mere existence of manual or pedal contact? That cannot be. The thing itself seems to be such an odd anomaly, that it suggests reflection.

Concerning the protection of possession afforded by the law, the various German writers on the subject have, it seems, enunciated the following theories. They have discovered the foundation of possession:

1. In the interdiction of private violence.
2. In the necessity that exists for preserving the public peace.
3. In the judicial principle that no one can overcome another in law, unless he has the advantage of a better right.
4. In the privilege of irreproachability, in virtue of which it should be admitted, in the absence of opposing proof, that the possessor, who may have the right of possession, actually has that right; every man being presumed to be innocent until the contrary is shown.
5. That possession is protected as probable property.
6. That it is protected as inchoate property.
7. That possession is protected as being the necessary complement to the protection to property.
8. That it is protected for itself, as being the human will materially incorporated.
9. That it is protected in order to preserve the existing state of affairs, until there is some reason shown for a change.

The treatise of Savigny is based on the first and second of these grounds; that of Von Ihering on the seventh. He argues that it is impossible for a man always to have his title

papers to every article of property that he owns about him, and as he is liable to injury at any time, it is necessary for his protection that the mere fact of possession should be taken as *prima facie* proof of ownership; otherwise, the proprietor would be put to great trouble, and would, sometimes, lose his cause in favor of a wrong-doer; and it so happens that the law cannot grant this kind of privilege to the true owner without granting it to every one in possession, whether rightfully or not. Possession is the exterior or visible part of ownership, and will stand for all of it, unless it is shown to be false.

We cannot perceive how any one of these theories should necessarily exclude the others, any more than we can see why custom should exclude legislation in the development of law; or, why legislation should take no notice of custom; or, why the utilitarian should reject the aid of a moral sense; or, why the advocate of conscience should repudiate the collateral support of utilitarianism; or, why either of them should ignore the power of human sympathy, when there is enough sympathy wasted in the world to run all the mills of the gods. Doubtless every important truth depends on many causes, and is evidenced in many ways. Yet, if one wants profound and accurate thought, he must go among theorists; but if he is in search of justness and liberality of view, he had better stay out in the sunshine of nature. Commonly enough, theorists discuss different questions under the guise of one. Thibaut contended for a code, as a careful compilation of existing laws, with such adaptations as might be necessary to make a harmonious system; Savigny objected, as if a code were invariably made up of new laws. So with the theories of possession. Each party only discusses a part, a particular view of the subject, of which he has made himself a partisan. But let us not suppose that these discussions are, therefore, futile and fruitless. By tunneling in various directions the mines of truth are explored; though, by too intent a vision, important facts lying on the surface are often overlooked. Thus with regard to possession; we do not know that the common law has any particular theory,

and we do not now recall any writer on the common law who, even remotely, refers to any theory on that subject; and yet we do not doubt but that the spirit of the common law affords promptly a practical and sufficient reason for the protection of possession, different from all those that have been already mentioned, and equally applicable to the laws of all civilized countries. If interrogated, it would simply say that the law presumes title in the possessor, from the fact in far the greater number of cases it is found by observation that property is in possession of the real owner. The presumption is not artificial, but is derived from actual facts. In the same way, the law presumes every given individual to be sane until the contrary is shown; not in order to protect sane men, but because, in truth, most men are sane; and the law cannot but take notice of the fact; and, because the law finds it easier, as well as more just, that the smaller number of individuals should be required to prove an exception, than the larger number should be required to prove a thing *prima facie* established by a general and well-known correlation. Taken in this view, there is nothing mysterious or singular in the protection that the law throws around possession; the law proceeds on analogous presumptions in a thousand instances.

U. M. ROSE.

LITTLE ROCK.

II. ESTOPPEL BY CONDUCT AS AFFECTING TITLE.

This kind of estoppel is called an *equitable estoppel*, because it was founded in equity, and had been for a long time recognized in equitable proceedings. It is a doctrine sanctioned both by sound policy and enlightened ethics, and must have general application in all civilized societies.

The basis of the doctrine is found in the principle of equity, (which Lord Eldon calls a very old one, in *Evans v. Bicknell*, 6 Vesey, 182,) that if a representation is made to another person, going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good if he knows it to be false.

The doctrine was, to a certain extent, outlined and applied at law in the case of *Heane v. Rogers*,¹ decided in 1829, in which it was said that admissions of a party, which have induced another to alter his condition, will be conclusive.

Again, in *Graves v. Key*,² Lord Tenterden is stated to have held that a receipt is conclusive evidence as to a person *who may have been induced by it to alter his condition*. These cases prepared the way for the first clear and distinct enunciation of the doctrine in law, in the leading case of *Pickard v. Sears*,³ to which the cases have since referred as the starting point and rise of equitable estoppel in law. Probably, in the history of law, there is no more apt illustration of the growth and expansion of a legal principle to meet varying conditions and requirements than in the rise and development of the doctrine of equitable estoppel. Its elements and principles have been gradually established and evolved, as new circumstances and exigencies demanded, and during

¹ 9 B. & C. 577.

² 3 B. & Ad. 318, n. (a).

³ 6 Ad. & El. 474.

the last fifty years it has become one of the important branches of the law, invoked to restrain fraud and chicane, and to bind men to good faith in their dealings with one another. It is not proposed to examine the subject in its various branches; it is particularly in its application to the subject of title that it will now claim our attention.

First, let us examine the principles laid down by Lord Denman, in *Pickard v. Sears*, whose language is :

“The rule of law is clear that where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.”

An analysis of this language will give, according to Lord Denman's enunciation, three essential elements to constitute an estoppel, namely :

1. A wilful representation made to another ;
2. Action by the other relying on this representation ;
3. An alteration in the position of the party acting on it.

This statement of the doctrine was made in 1837; but a few years previously in this country the doctrine of equitable estoppel was clearly laid down in the case of *Welland Canal Company v. Hathaway*,⁴ decided in 1832, which has since been referred to on almost all occasions when the doctrine of equitable estoppel is examined, and is justly placed at the head of our American cases on the subject.

In that case Nelson, J., stated that “a party will be concluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter.” It is worthy of remark how exactly the two cases agree in the enunciation of the doctrine, neither judge having had a knowledge of the other's decision. It is a good example to show how the application of purely equitable principles will lead to the same result, no

⁴ 8 Wend. 480.

matter where applied. The next authoritative statement of the doctrine was in the case of *Dezell v. Odell*,⁵ a decision given with knowledge of the previous cases just cited. Cowen, J., in giving the decision of the court, says: "We then have a clear case of an admission by the defendant, *intended* to influence the conduct of the man with whom he was dealing, and actually leading him into a line of conduct which must be prejudicial to his interests, unless the defendant be cut off from the power of retraction." This I understand to be the very definition of an *estoppel in pais*. Bronson, J., examined the doctrine carefully, citing the previous cases, and substantially holding the same doctrine.

The statement of the doctrine, as thus given, confined the estoppel within too narrow limits. As thus held, it was essential to the estoppel that the representation should be *designedly* or *wilfully* made; and thus the party estopped was considered as *guilty of a fraud* if he attempted to retract or contradict the representation when the other party relying on it has acted on the faith of it. The idea was that there should be some active personal influence used by one party to induce the other to act. This would exclude many cases where one acts, or so conducts himself, as to give another a reasonable inducement to rely on a certain state of facts. The courts soon felt the necessity of modifying the strict rule laid down in *Pickard v. Sears*, and recognized an estoppel when there was *no wilful representation* or *fraudulent intent* on the part of the person estopped. The first modification was in *Freeman v. Cooke*,⁶ where Parke, B., uses this language in reference to *Pickard v. Sears*: "By the term 'wilfully,' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue—at least, that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intentions be, he so conducts himself that a reasonable man would take the representation to be true, and believes that it was meant that he should act upon

⁵ 3 Hill, 215, decided in 1842.

⁶ 2 Exch. 654.

it, and did act upon it, as true, the party making the representation would be equally precluded from contesting its truth." The same views are more clearly and emphatically expressed in the subsequent case of *Cornish v. Abington*.⁷ The same modification was made in this country. Thus, in *Manufacturers' Bank v. Hazard*,⁸ it is held that "it is not necessary to an equitable estoppel that the party should design to mislead. If his act was calculated to mislead, and actually has misled, another acting upon it in good faith, and exercising reasonable care and diligence under all the circumstances, that is enough." The same views were held in a later case in New York, where the English authorities are cited.⁹

In a recent case in Missouri the same is the doctrine of the court, which holds: "If a person encourages another to purchase either land or a chattel, he cannot afterwards assert any title in himself to the thing purchased, although he may have been ignorant of his rights when he gave the encouragement; *for though there may have been no fraudulent intent, yet the assertion of his title would operate as a fraud, in the same manner as if there had been a fraudulent purpose.*"¹⁰ In a case in Pennsylvania, *McKelvey v. Truby*,¹¹ a similar decision is made, where it is held, "where a man encourages another to settle upon and improve land, and expend his money and labor upon it, he will not afterwards be permitted to take it from him, although he has an older and better title for it, and although his encouragement was given in ignorance of his own rights."

The idea of some fraudulent intent in the mind of the party when the representation or admission was made on which another acted, has pervaded the cases, and this has produced in many places a confusion in the minds of many regarding this kind of estoppel. This idea was prominent in

⁷ 4 H. & N. 549.

⁸ 30 N. Y. 226.

⁹ *Continental Nat. Bank v. Bank of Commonwealth*, 50 N. Y. 575.

¹⁰ *Rice v. Bunce*, 49 Mo. 231.

¹¹ 4 Watts & S. 323.

the elaborate decision of Field, J., in California, in the case of *Boggs v. Merced Mining Co.*¹² His language there is that "there must be some degree of turpitude in the conduct of a party before a court of equity will estop him from the assertion of his title." Now, it will evidently appear, from most of the cases, that there was no fraud whatever intended, no wilful misleading, when the representation was made; but the controlling consideration is the *effect* on the party setting up the estoppel—whether it will work an injury to him, in the same manner as if a fraud was actually committed by the other party. This is now the position the courts are taking, and it is inevitable if the doctrine of estoppel is pushed to its proper limits. It is not so much the *intention* of the party estopped as the *effect* on the party setting up the estoppel. Even Field, J., in a late decision in the Supreme Court, admits that an estoppel may arise where there is no fraudulent intent on the part of the person estopped. In *Henshaw v. Bissell*¹³ he says: "For its application, there must be some intended deception in the conduct or declarations of the party to be estopped, *or such gross negligence on his part as to amount to constructive fraud.*" And in the last edition of Washburn, on Real Property, he draws attention to this decision as a modification of the doctrine that fraud must exist on the part of the person estopped.¹⁴

There is no doubt that, as the authorities now are, there need not necessarily be fraud or bad faith by the party estopped; the main test is, would it work a fraud if the estoppel were not upheld.¹⁵ The assertion of the doctrine in this manner meets the well-known salutary maxim, that when one of two innocent parties must suffer, he shall suffer who, by his acts, occasioned the confidence and the loss. This view was precisely taken in a late case in New York,

¹² 14 Cal. 279.

¹³ 18 Wall. 271.

¹⁴ Real Property, 81.

¹⁵ The following cases, in addition to those cited, bear out this statement: *Stevens v. Dennett*, 51 N. H. 324; *Smith v. Cramer*, 39 Iowa, 413; *Kirk v. Hartman*, 63 Pa. St. 97; *Garnar v. Bird*, 57 Barb. 277; *Beardsley v. Foot*, 14 Ohio St. 414; *Preston v. Mann*, 25 Conn. 118.

and the principle directly applied. The heirs of A, under a mistaken supposition that his executor, or one of the heirs, was authorized to sell his lands, informed one who wished to purchase that the executor or heir named was authorized to convey them, and he took a deed from the executor and heir; they were estopped to claim the land, whether these representations were made fraudulently, or innocently under a mistake, inasmuch as the purchaser had acted on the faith of their being true; and the court, in such a case, would compel the heirs to convey to the purchaser, and thereby relieve the estate from a cloud upon the title.¹⁶

As a general rule, the party estopped is required to have knowledge of the facts respecting which a representation or admission is made; for in most cases it would be unreasonable and unjust to bind a party to the admission of a fact, without fraud on his part, when he was mistaken as to the matter of fact. So it is held as an element of the estoppel that a party must have, or be presumed to have, knowledge of the facts out of which the estoppel arises.¹⁷ But, like many general broad propositions in law, which can be practically and safely applied on most occasions, it would not be safe to assert absolutely that on *every occasion* when the doctrine of estoppel is set up against a party, he *must* have knowledge of the facts respecting which he has made an admission. Hence we shall find cases limiting the general proposition stated. It is easy to conceive that a person may negligently or wantonly make an admission without information, or without taking pains to inform himself, upon which another may honestly act, having no other possible means of information; and would it, in point of morals or equity, be fair to let the latter suffer by reason of the carelessness of the other? When the enquiry is presented in this manner, it is at once obvious that we must modify the general

¹⁶ Favil v. Roberts, 50 N. Y. 222.

¹⁷ Hill v. Epley, 31 Pa. St. 331; Fletcher v. Holmes, 25 Ind. 459; Malloney v. Horan, 49 N. Y. 111; Clark v. Coolidge, 8 Kan. 189; Lefevre v. Lefevre, 30 N. Y. 27; Pierce v. Andrews, 6 Cush. 4; Second Nat. Bank v. Walbridge, 19 Ohio St. 419.

proposition that a person must have knowledge of the facts out of which the estoppel arises. This was the view taken in *Favil v. Roberts*, *supra*. Bigelow, in his work on Estoppel, says: "It seems to be well settled that a party's ignorance of the truth of the representation made will not remove the estoppel if his ignorance is the result of gross negligence."¹⁸ A late case in Iowa, decided in 1875, adopts this view, and the language of Bigelow is cited, with approval by the court.¹⁹

In *Stevens v. Dennett*²⁰ it is said: "Indeed, the doctrine seems to be well established by authority that the *conduct* and admissions of a party operate against him in the nature of an estoppel wherever, in good conscience and honest dealing, he ought not to be permitted to gainsay them. Thus negligence becomes constructive fraud, although, strictly speaking, the actual intention to mislead or deceive may be wanting, and the party may be innocent, if innocence and gross negligence may be deemed compatible; and in such cases the maxim is justly applied to him, that where one of two innocent persons must suffer, he shall suffer who, by his acts, occasioned the confidence and loss."

This being established as a limitation of the general proposition, the next important enquiry is, whether ignorance of one's legal rights respecting the facts, knowledge of them being conceded, will avoid the estoppel?

Now, if the courts have held the estoppel under certain circumstances when a person did not know the truth of the facts, it will surely be an easy position to take, that when a person, knowing certain facts, and in ignorance of his legal rights respecting them, when it was possible to acquire the

¹⁸ P. 540, citing *Calhoun v. Richardson*, 30 Conn. 210; *Preston v. Williams*, 25 Conn. 118; *Slim v. Croucher*, 1 De G. F. & J. 518; *Smith v. Newton*, 38 Ill. 230.

¹⁹ *Swezey v. Collins*, 40 Iowa, 540; to the same point, *Hall v. Doran*, 13 Iowa, 368; *Williams v. Allison*, 33 Iowa, 278; *Ford v. Loomis*, 33 Mich. (Jan., 1876); *Whittaker v. Williams*, 20 Conn. 98; *Shapley v. Rangeley*, 1 Wood. & M. 217.

²⁰ 51 N. H. 324.

knowledge, makes an admission, either by words or acts, causing another to act to his prejudice, with no better means of information, that in equity and good conscience the former ought to be estopped. The simple question would arise, whose fault is it that the person did not know his legal rights, which he especially should be presumed to know? Would it be equitable to suffer the other to bear a loss occasioned by the ignorance or negligence of a party respecting his legal rights? It is easy to answer these questions on equitable principles; and we shall find authorities in abundance holding that ignorance of one's legal rights alone will not avoid an estoppel.

The most thorough examination of this branch of the subject was made by Chancellor Kent, with his usual learning and research, reviewing early English cases in equity, in *Storrs v. Barker*.²¹ In this case, it appeared, a married woman devised certain property to her husband under a mistaken idea that she could make a valid will. Her father, Barker, the defendant, would, under the law, be her heir, the will being invalid; but he, in ignorance of his legal right, and knowing the facts connected with the devise, advised Storrs, the plaintiff, to buy the land from his daughter's husband, telling the plaintiff he believed the title good under the will, and disclaiming any right to the property. Chancellor Kent decided that Barker, notwithstanding his ignorance of his legal rights, had estopped himself from making any claim to the land. He says: "The presumption is that every person is acquainted with his own rights, provided he had reasonable opportunity to know them; and nothing can be more liable to abuse than to permit a person to reclaim his property, in opposition to all the equitable circumstances which have been stated, upon the mere pretence that he was at the time ignorant of his title. Such an assertion is easily made and difficult to contradict." In *Tilton v. Nelson*²² the same principle was adopted, and Emott, J., cited *Storrs v. Barker* as an authority for the decision. He says: "The

²¹ 6 Johns. Ch. 166.

²² 27 Barb. 595.

question is presented, whether ignorance of the law will prevent the application of the rule of equitable estoppel." * * * And, citing the decision of Chancellor Kent, he says when a party thus asserts his ignorance of his title to avoid an estoppel, he encounters two principles of law of general application: "The first of these principles is, that when a party procures, or even acquiesces in the disposition of his property, by another, under color of title and pretending to title, he shall be bound by such disposition, and shall be presumed to know the law so far as it is applicable to the case. The other is, that even if he shows that he was really ignorant of the law, and acted in ignorance, still the maxim, '*Ignorantia legis neminem excusat*,' will apply in favor of the other party."

The principles thus enunciated in these cases, founded, as they are, on the plainest rules of equity, have received endorsement in many other cases. Thus, in *Smith v. Cramer*,²³ one who had pleaded a judgment in honest ignorance that it was void, was nevertheless held to be estopped from availing himself of mistaking his legal rights. And so in *Maple v. Kussart*.²⁴ It appeared a husband and wife were seized of an estate by entireties. The husband, by will, directed the land to be sold, and the proceeds divided among his wife and children. Having named no one to make the sale, the land was sold under an order of the orphan's court, and bought by two of the children, at the request of the widow, who received her share of the proceeds, in accordance with the will. After her death, in ejectment for the land by some of the heirs, it was held that they were estopped by her acts, and that the estoppel would operate, notwithstanding she was ignorant of her rights. The same point is settled in other cases.²⁵

We can now state in a proposition, as a general conclusion of the enquiry, *that the estoppel will operate against a party who has made a representation or admission, either with knowl-*

²³ 39 Iowa, 413.

²⁴ 53 Pa. St. 348.

²⁵ *Rice v. Bunce*, 49 Mo. 231; *McKelvey v. Truby*, 4 Watts & S. 323; *Garnar v. Bird*, 57 Barb. 277.

edge of the facts, or who so negligently conducts himself as to properly induce another, without means of information, to believe the existence of a certain state of facts ; and ignorance of his legal rights, knowing the facts, will not prevent the estoppel.

As a corollary from this proposition, it is obvious that the admission may not be directly or personally made to a party ; it will be sufficient if it was of such a character as to warrant any one acting on the faith of it.²⁶ This is applicable to those cases where a person, under some color of title, assumes to act in reference to the property of another, and the latter, knowing the fact, endorses or ratifies the act. By this conduct the party thus endorsing the act of the other proclaims his consent thereto, and justifies any one acting on the faith of such consent. This principle of the law of estoppel is very clearly laid down in the House of Lords, in *Cairncross v. Lorimer*,²⁷ where Lord Chancellor Campbell uses this language: "The doctrine of all civilized nations is, that if a man, either by words or by *conduct*, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not be lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words, *or to the fair inference to be drawn from his conduct.*" An analogous principle is laid down in a late case in New York, where it is held that two things must concur to create an estoppel by which an owner is prevented from asserting title to, and is deprived of, his property by the act of a third person without his assent: 1. The owner must have clothed the person assuming to dispose of the property with the apparent title to, or authority to dispose of, it. 2. The person alleging the estoppel must have acted and parted with value upon the faith of such apparent ownership or authority, so that he will

²⁶ *Mitchell v. Reed*, 9 Cal. 204 ; *Graff v. Pittsburgh R. R. Co.* 31 Pa. St. 489 ; *White Mt. Bank v. West*, 46 Me. 15 ; *Quirk v. Thomas*, 6 Mich. 76.

²⁷ 3 Macq. 827, decided in 1860.

be the loser if the appearances to which he trusted are not real.²⁸

There may be many ways by which a person may unmistakably evince his assent to the act of another in dealing with his property; but the beginning of a suit to assert a right arising out of the act, or the reception of a pecuniary benefit therefrom, is invariably held sufficient to estop the party thereafter to deny the validity of the act.²⁹

This ground of estoppel is frequently applied in case of a claim of dower. Thus, in *Reed v. Morrison*,³⁰ Duncan, J., says: "If the fact be so that the surplus of the sale went to her use and support after her husband's death, with her knowledge, I think equity would interpose. It is as strong an equity as if she had stood by and seen the estate pass to an innocent purchaser, as she would, as to him, be guilty of a fraud and concealment, which would justify the interposition of a court of equity." A strong case to illustrate this kind of estoppel is an early case in Pennsylvania.³¹ In this case lands sold by the husband in his lifetime were bid in by the executor after his death, for the benefit of the estate, under a judgment recovered for the unpaid purchase money. Afterwards, with the consent and approbation of the widow, *who was a legatee under the will*, the executor resold and conveyed the premises. No claim for dower was suggested by the widow during these transactions, but she afterwards brought an action of dower against the purchaser from the executor. Yeates, J., said: "Mrs. Deshler is entitled to recover her dower in the premises unless the peculiar circumstances of the case operate as a bar. The circumstances relied upon to produce that effect are these: She made Newhart her agent to buy the land at the sheriff's sale, and she approved of the purchase after it was made. She also knew and approved of the resale to the defendant, at a full price, and uncharged with dower, and until the defendant had paid the

²⁸ *Barnard v. Campbell*, 55 N. Y. 456.

²⁹ *Bigelow on Estoppel*, 584, citing many cases.

³⁰ 12 S. & R. 18.

³¹ *Deshler v. Beery*, 4 Dall. 300.

price she never set up the present claim. The motives of Mrs. Deshler in observing this silence cannot be positively ascertained; but she might think that if the land sold high, in consequence of appearing clear of every encumbrance, there would be the better prospect that her legacy of £1,000 would be paid." The jury were told to find whether she waived her claim, and they found against her. This was decided in 1804, when the doctrine of estoppel had not been clearly established. The facts, as they were stated by the court, would now, as a question of law, be sufficient to estop her, and it would not be a question for the jury as to her motives.

A recent case in Pennsylvania is well worth attention in this connection, where the estoppel was maintained in the case of a widow claiming a benefit under a will. This is *Cox v. Rogers*,³² decided by a very able court, all the judges concurring. It appeared a testator made a certain legacy of personal property of a considerable amount to his wife, and then provided: "I do will to my son, his heirs and assigns, my farm, etc., subject to my wife's thirds." The farm, in reality, belonged to the wife, and therefore there was no right in the testator to dispose of it. It was held that, as she had accepted and retained the legacy of the personal property under the will, she and her heirs were estopped from claiming the farm. Williams, J., says: "Here the legatee kept and used the money which she elected to retain according to the will, * * * with a full knowledge of all the facts on which her rights depended, without retracting her choice or offering to return it, and from the amount of personal property that she left behind her, died, it is to be presumed, with the greater part, if not the whole of it, in her possession. What equity, then, have the heirs to set aside her election, deliberately made, never retracted, and evidenced by acts of the most unequivocal character?"

This kind of estoppel, founded on one's conduct in ratifying an act or contract, though invalid at the time, has lately been applied to the case where infants, who, on coming of age, received money, knowing the facts, from a partition of

³² 77 Pa. St. 160.

their real estate made when they were minors, which would otherwise have been invalid.³³

We shall now examine the agency of the party setting up the estoppel, to ascertain what must take place, as far as he is concerned, before the estoppel is complete. In the first place, it is essential that he has relied on the admission, representation, or act, of the party whom he seeks to estop, without other means of information as to the real state of facts. For if the party had no need to rely implicitly on anything said or done by the other; if he could have received information as to the true state of affairs from sources that were accessible to him, it is then his own negligence if he does not properly inform himself. This was well illustrated in *Hill v. Epley*,³⁴ overruling the case of *Epley v. Witheron*.³⁵ The court in this case held that when a person's title was on record, that his standing by when his property was sold, without disclosing his interest, was not sufficient to estop him, because the true state of the title could be known to the other party. This is regarded as a leading case on this point, and it has since been generally cited with approval when the doctrine of equitable estoppel is examined.³⁶ But, on the other hand, the authorities are clear that a person having a title or claim to property which is not on record, and who stands by and permits another to acquire a title thereto, and make improvements, without disclosing his title, will thereafter be estopped from enforcing his claim or title. Thus, in *Odlin v. Gove*,³⁷ Bellows, J., says: "To constitute an equitable estoppel by standing by, and seeing valuable improvements made upon the land by another, without objection, it must appear that the owner was fully aware of his own title, or, in other words, that he wilfully concealed it, and

³³ *Walker v. Mulvean*, 76 Ill. 18. See *Drake v. Wise*, 36 Iowa, 476.

³⁴ 31 Pa. St. 331.

³⁵ 7 Watts, 163.

³⁶ See on this point, *McCune v. McMichael*, 29 Geo. 312; *Simpson v. Pearson*, 31 Ind. 1; *Anderson v. Coburn*, 27 Wis. 558; *Bramble v. State*, 41 Md. 436; *Lawrence v. Brown*, 5 N. Y. 394; *Drew v. Kimball*, 43 N. H. 282; *Wood v. Griffin*, 46 N. H. 237.

³⁷ 41 N. H. 473.

that the occupant, being ignorant of such title, was misled by such silent acquiescence, and induced thereby to change his position."

This case is good law in the case where a person is silent when he is not aware of his title; but when a person about to purchase enquires from a person as to his title, and the latter, having means to know it, but, under a mistake, disclaims any title, the latter will thereafter be estopped, if on the faith of such disclaimer the party, with no other means of information as to the title, has acquired it, and made valuable improvements. This was the purport of the decision in *Beardsley v. Foot*.³⁸ So, in *Fletcher v. Holmes*,³⁹ it is held that "a mere failure to give notice of a right where another, without knowledge of the facts, is investing his money, and where it may be fairly concluded that he would not do so if informed of the facts, will generally preclude a subsequent setting up of the claim thus concealed." The case of *Brown v. Bowen*⁴⁰ well illustrates the position here laid down by the Indiana Supreme Court. The defendants, owning the lower of two wing dams in a river, by means of which they could flow back upon the upper one, and, having a right to do so, suffered the purchasers of the upper dam to go on and make expensive improvements upon the works at the upper dam without making known their claim of a right to obstruct these works, although they saw the upper owners making these expenditures, they were estopped to flow back and injure the upper works. The result may be summed up by saying *that one who stands by, being cognizant of his title, and permits another to acquire it, (the latter having no means of information,) will not be permitted to set up such title thereafter, and a disclaimer of title by words or acts, though under a mistake, on which another has been induced to act in good faith, will have the same effect.*

Washburn, reviewing the cases, says: "Amongst the variety of rulings of courts upon this subject, * * * the better opinion now seems to be, that if a man holds a title to

³⁸ 14 Ohio St. 416.

³⁹ 25 Ind. 458.

⁴⁰ 30 N. Y. 541.

his lands by deed, which has been duly recorded, it is all the notice he is bound to give so long as he remains passive ; and that it is only when he sees another purchasing land upon which he has some unrecorded lien or charge, of which the other is ignorant, that he is bound to give notice thereof."⁴¹

It must, therefore, appear that the party setting up the estoppel relied in perfect good faith on the words or conduct of the other party, and that he was compelled to rely on it as his only means of information. But yet a party may rely, and in good faith, too, upon what was not sufficient to give him a reasonable inducement to act, and the estoppel will not be supported. The inducement must be reasonably presumed to be sufficient to influence the other party. So where the purchaser does not believe the statements made in a certificate or act on a belief of the truth of such statements, induced by the certificate, the certifying party is not estopped from proving such facts.⁴²

It must appear, also, that the party setting up the estoppel would sustain some injury if the representation or admission were shown to be different, or contradicted. Indeed, this is the principal part of the estoppel ; for where no injury, or change of one's position has been effected, there is no need of the estoppel as a protection to a party. But when the person has been induced to change his position, and injury would naturally result, it is regarded as a fraud upon him, when he acted in good faith, if the other should now gainsay what he before said, or contradict his admission, and this is independent of any fraud actually intended by the party estopped. So it was held that the conduct of a party to a transaction will not be sufficient to estop him because either

⁴¹ Real Prop. 4th ed. 78. In addition to cases cited, see *Thompson v. Sanborn*, 11 N. H. 201, where the owner of personal property was estopped who suffered it to be mortgaged in his presence to one ignorant of his title ; *Abrams v. Seale*, 44 Ala. 297 ; *Brooks v. Curtis*, 4 Lans. 283 ; *Eldred v. Hazlitt's Admr.* 33 Pa. St. 307 ; *Skinner v. Stouse*, 4 Mo. 93 ; *Rice v. Bunce*, 49 Mo. 231 ; *Newman v. Hook*, 37 Mo. 207 ; *Goodwin v. Cincinnati, etc. R. R. Co.* 18 Ohio St. 169 ; *Morris v. Moore*, 11 Humph. 433 ; *Cailiff v. Hillhouse*, 3 Minn. 311 ; *Truesdale v. Ward*, 24 Mich. 117.

⁴² *Eitel v. Bracken*, 38 N. Y. Superior Ct. 7.

not accompanied by a design that the other party should act upon it, or not followed by any change in the situation of that party.⁴³

In the case of *Schmaltz v. Avery*⁴⁴ the necessity of some injury or prejudice to the party setting up the estoppel was insisted upon. The court, Patteson, J., say: "In the present case, the names of the supposed freighters not being inserted, no inducement to enter into the contract from the supposed solvency of the freighters can be surmised. Any one who could prove himself to have been the real freighter and principal, whether solvent or not, might most unquestionably have sued on this charter party. The defendant cannot have been in any way prejudiced in respect to any supposed reliance on the solvency of the freighter, since the freighter is admitted to have been unknown to him, and he did not think it necessary to enquire who he was."

The *quantum* of damage resulting is immaterial. It need not be proved to any extent; it is sufficient if it can be fairly presumed, or likely to result. Thus, in *Fall River Nat. Bank v. Buffington*,⁴⁵ the plaintiffs sued on an endorsement of two promissory notes. The defendant's name was on the paper as an endorser, which, however, was a forgery; but the defendant had, when enquired of, said it was genuine; he, then, was estopped to deny the genuineness of the signature. The instruction was that the plaintiffs would be entitled to recover of the defendant the whole amount due on the notes, and that it was immaterial whether the plaintiff's actual damage was more or less. This instruction was excepted to, but it was on review held to be correct. The same principle was held in the English case of *Knights v. Wiffin*,⁴⁶ where, other ele-

⁴³ *Carroll v. Manchester, etc. R. R. Co.* 111 Mass. 1; *Connihan v. Thompson*, 111 Ib. 270. To the same point see *Wheadon v. Olds*, 20 Wend. 174; *Tucker v. Mallory*, 48 Barb. 90; *Brown v. Bowen*, 30 N. Y. 541; *County Commrs. v. Robinson*, 16 Minn. 381; *Burdick v. Michael*, 32 Mich. 246.

⁴⁴ 16 Q. B. 655.

⁴⁵ 97 Mass. 498.

⁴⁶ L. R. Q. B. 660.

ments existing, the simple enquiry, it was held, would be, had the party been induced to alter his position in consequence of the representation.

JOHN PROFFATT,

SAN FRANCISCO.

III. THE DARTMOUTH COLLEGE CAUSES AND THE SUPREME COURT OF THE UNITED STATES.

(No. 4.)

“In the end”—to use the prophetic words of Webster—Story virtually decided *Trustees v. Woodward*, as well as the causes sent up from his circuit.

The accession of his vote, the weight of his learning, his personal influence with certain judges, and his tact and management, made a hopeless minority, the court. The other causes were nominally decided by him in the summer of 1819, but, in everything except the name, before they were either heard or remanded.

A few ‘leaves from life’ will show better than any words of ours that this astute politician lost none of his great powers by his transfer from the caucus to the consultation room. An intimacy, personal and political, had subsisted for years between Story and Governor Plumer. They were both Massachusetts men; were born in the vicinity of each other; had practiced at the Rockingham bar; had shared the same general views in regard to the embargo, the restrictive policy, and the great measures which preceded and arose during the war of 1812.

In September, 1815, Governor Plumer visited Story, as well as other friends, at or near his birth-place. In his journal, under the date of September 16, 1815, he says: “At Salem I spent an afternoon with Joseph Story, one of the judges of the Supreme Court of the United States. He said the judges of that court had informally considered the question whether the governor of a state was bound, on the requisition of the president, to order the militia into the service of the United States. He could, he said, discover no diversity

of sentiment among them; he believed they were unanimously of opinion that the governors were bound to obey the requisition, and regretted that neither the president nor Congress had required their opinion on the subject. He complimented me on my speech to the Legislature in November, 1812, upon the question of ordering out the militia, and said that my reasoning appeared to him conclusive. He mentioned of his own accord that he had considered the law of New Hampshire of 1813, establishing the new judiciary, and was of opinion that it was unconstitutional." *Life of Plumer*, 430, 431.

This simple statement from the pen of a friend portrays Story's whole judicial life.

The constitution of New Hampshire provides that the judges "shall hold their offices during good behavior." The Federalists came into power in 1813, upon the anti-war issue. One of their first acts was to blot out the inferior courts, abolish the Superior Court—the constitutional court of last resort—turn out the old judges, by repealing the act creating these courts, and to establish a new system upon their ruins. This led to grave complications. Some of the old judges held the act void, and went on holding their terms, as did the new ones; some sheriffs recognized the new, and some adhered to the old court. The result was scandal and disturbances, but no blood-shed.

When the anti-Federalists, under the lead of Plumer, came again into power, a few months after this interview with Story, they acted in accordance with his opinion, in which Plumer and other leaders coincided, repealed the act of June 24, 1813, under which the new judges held their offices, removed them by address, upon the ground that the law was unconstitutional, and restored the old system. No man knew the facts better than Webster; but when, in his argument in the college case, he went out of his way, for a purpose, to assail with unwonted severity the state government of 1816, and especially its legislature and the judiciary, he preserved a guarded silence as to the cause of it, which was the revolutionary proceedings of his political associates in 1813.

Story could have advised Marshall of the truth had he seen fit, but the tone and coloring of the opinion of the chief shows that he did not know it.

Nothing could be more characteristic of Story than what he said to Governor Plumer about the power of the president to call out the militia, and this informal decision of the Supreme Court of the United States.

The constitutions of Missouri, Maine, Massachusetts, and New Hampshire, and perhaps other states, are substantially alike in one respect: they grant to the other departments of the state government the power to "require" the opinions of the judges of the highest court upon important questions of law, and upon solemn occasions. The opinions in 37 Mo. 139, 51 Mo. 140, 55 Mo. 498, and that of Judges Richardson and Bell, from which we have already quoted, show that no limits to this loose and ill-defined power have ever been fixed or established. In the Federal Convention, August 20, 1787, Pinkney submitted, among others, the following proposition: "Each branch of the Legislature, as well as the supreme executive, shall have authority to require the opinions of the Supreme Judicial Court upon important questions of law, and upon solemn occasions." This project was referred to the committee on detail, and never afterward heard of. The plan for associating the judges of the Supreme Court with the executive as a "council of revision," invested with a veto power, though supported by some of the purest and ablest men in that body, was defeated by a large majority. No such provision, and none anywise akin to it, ever existed in the constitution of the United States, and no man knew it better than Story. It has been truly said of him that he absorbed jurisdiction like a sponge. The constitution became in his hands a most elastic instrument. He derived this power, as he did many others, by a construction so "liberal" that it was well nigh limitless.

The Legislature of New Hampshire, in 1794, authorized the governor to call out the militia whenever required by the president. Governor Plumer, in 1812, promptly obeyed the requisitions made upon him, and was assailed with great viru-

lence therefor. Governors Strong, of Massachusetts, and Griswold, of Connecticut, refused to obey similar requisitions, upon the ground that the governor of each state was the sole judge whether the exigency contemplated by the Federal constitution had arisen; and it was also held in Massachusetts and Vermont, that although the president, when actually in the field, could command the militia, yet he could not put them under any but their own state officers. The opinions of Judges Parsons, Parker, and Sewall, given to Governor Strong, are to be found in the eighth volume of Massachusetts reports, 547-550. This great question was first decided by the Supreme Court, in 1827, in *Martin v. Mott*, 12 Wheat. 19. Story delivered the opinion of the court. It is needless to add that he adhered to the informal decision which he had announced to Plumer so many years before.

In the absence of special rules, no "indecorum," to use Webster's phrase, would be committed if counsel furnished their arguments, written or printed, to every member of the court. We commented in a previous paper upon the fact that Webster furnished his argument, through Story, to some of the judges and not to others—partly in the nature of briefs, and apparently, in part, as campaign documents. We should add that the correct course was suggested by Isaac Parker, Chief Justice of the Supreme Court of Massachusetts, and the devoted personal and political friend of Webster. In his letter of April 28, 1818, to Webster—which lies before us as we write—Judge Parker says:

"The effect produced upon my mind by the argument you were good enough to send me, is such as to induce me most earnestly to wish that it may not only be printed, but published and extensively circulated. Public sentiment has a great deal to do in affairs of this sort, and it ought to be well founded. That sentiment may even reach and affect a court; at least, if there be any members who wish to do right, but are a little afraid, it will be a great help to know that all the world expects they will do right. Besides, there is a natural leaning in favor of legislative power, for it is the power of the people when constitutionally exercised; but the people

ought to be made to know that in certain cases their rights are above the reach of the Legislature, and thus popularity may be given to a denial of legislative power. In popular governments it is not only expedient, but wise, to get the people on the side of right principles; indeed, that is the only way effectually to prevent wrong.

“The argument of Richardson, Ch. Jus., is completely but decorously answered in your pamphlet; but, unanswered, it will have its weight, not only with the vulgar, but even with the bar and [those] who have not leisure or inclination to look into the thing themselves. It is of importance to enlist all enlightened men on your side of the question, not merely on account of Dartmouth College. Every institution in the country is liable to the same attack, and must [be] defended on the same principles. To show the importance of presenting this argument to every man's view, consider its effect upon me. When I read Richardson's opinion, although I instinctively revolted at his conclusion, yet I was unprepared to show the fallacy of his fundamental point, viz.: that a literary institution was a public corporation. Now, nothing appears more weak than his position, for the contrary is demonstrated by reasoning as well as authority. You heard not Leach too, who knows almost everything, ask why a college was not a public corporation. It certainly is probable, then, that many persons, by no means ignorant, are uninstructed upon this subject, not having had occasion to consider it.

“I think, also, that every judge of the Sup. Court of U. S. ought to have a copy of this argument—for what is written, may be recurred to; what is spoken, may be lost.

“I believe the college will ultimately prevail in this suit, for I cannot well perceive how a decision against it can be maintained reputably, considering the principles already adopted by the court.

“You are aware, I suppose, that much less interest has been taken in this question by the learned public than such a great question is calculated to excite. It is because the conduct of the trustees, previous to the assumption of power by the Legislature, was generally thought to be unjust and

founded in the narrow policy of sectarians. The exercise of power by the Legislature, too, has the advantage of seeming to be favorable to more enlarged and liberal views.

“Your pamphlet is calculated to show that something more important than the success of a religious party is at stake, and to awaken the attention of all who feel an interest in the principles upon which any institution can be supported, and this is another strong reason for publishing and circulating.”

The allusion to the public sentiment in regard to the trustees, and the necessarily more delicate one which had reference to the position of certain judges, can hardly be misunderstood; but the framers of the constitution never intended to commit the guardianship and construction of that instrument to a court whose decisions were controlled by the atmosphere of a manufactured public sentiment.

The long struggle between Story and the Supreme Court of New Hampshire, with Joel Parker at its head, over the construction of a clause in the bankrupt act of 1841, is not yet entirely forgotten. The proviso in that act expressly provided that nothing in the act should be “construed to annul, destroy, or impair * * * any liens, mortgages, or other securities, on property, real or personal, which may be valid by the laws of the states respectively;” and the question was, whether an attachment, made in accordance with the laws in New Hampshire, and which had, in substance, been in force since they were enacted in Massachusetts (of which New Hampshire was then a part) nearly two hundred years before, was such a lien or security. No man knew the time when it had not been denominated a lien by the courts in New Hampshire. It had been termed a security in the statutes for many years before the existence of the bankrupt act. Story, in one of his works, had affirmed that such attachments were liens. The same view had been taken by the highest courts of Massachusetts, Maine, and Connecticut, by many of the most eminent lawyers in these states, and by some of the ablest Federal judges. Story was the author of this bankrupt act, which had been a pet hobby with him

from the time he came to the bench. Nearly a quarter of a century before its passage, he had importuned Webster to ask him to frame such a law. He dinned it in the ears of his associates, and eminent and influential members of Congress, until it passed. Grave questions arose as to the extent of the power granted by the constitution to Congress. The discussions at the bar, the speeches of Mr. Benton and other eminent statesmen, and the reports of the Supreme Court, to which we have already referred, show how greatly professional opinion was divided. Story decided many of these questions in the same way that he did others in his interview with Governor Plumer. His opinion, in substance, was that the act was uniform; that its constitutionality must be upheld; that it was a good law; that the court must supply its defects—fill the gaps—by a “liberal” construction; that the act gave the district and circuit judges the power to “overhaul” and “control” all state courts and all proceedings therein. There is at least one member of the New Hampshire bar still living who remembers the peculiar smile and glistening eye of Judge Parker when he related what Story had said. It is, perhaps, to this incident to which Parker alludes in the close of his opinion in *Kittredge v. Warren*, when he says: “We have only to remark, farther, in conclusion, that we have been strongly impressed from the first with the views now expressed; and the extended examination we have made has left no reasonable doubt upon our minds respecting the result.”

The Supreme Court of New Hampshire at the time of this collision, to use the words of Mr. Bishop, was “one of the most able judicial tribunals in the Union.”

Judge Parker was as “indefatigable” as Webster said John Wheelock was. He was a great lawyer, a great judge, and a great man. Chief Justice Bell, one of his successors, well said of him: “He was a most formidable antagonist, and combined the strength of five men with the sensitiveness and tenacity of ten women.” He was a Federalist and a Whig of the iron stamp; but such was the respect felt for him by his political opponents, that, of their own accord, they

first made him judge and then chief justice of the highest court of the state, and sustained him in that position from first to last.

In April, 1842, Story gave an elaborate opinion in *ex parte Foster*, 2 Story, 131. Before the filing of the petition, the property of the bankrupt had been attached on mesne process in one of the Massachusetts courts. He applied to the district judge for an injunction to restrain further proceedings in the state courts, and requiring the property to be handed over to the assignee. The district court certified the questions to the circuit court. Story decided that the attachment was not protected by the saving clause, and adhered to his opinion that the state courts were but wax in the hands of the district and circuit courts, and that these Federal judges could "overhaul, control, or set aside" the proceedings and judgments in the state courts just as, in *Martin v. Mott*, he affirmed the opinion he had given Governor Plumer eleven years before.

In *Kittredge v. Warren*, January, 1844, (14 N. H. 509,) William H. Duncan, the son-in-law of Trustee Olcott, and the brother-in-law of Rufus Choate, who still lives, as he always has, right under the shadow of the college, was counsel for the defendant. He relied on the reasoning and authority of *ex parte Foster*. This drew from Judge Parker, as the organ of the court, an able adverse opinion nearly thirty pages in length. In July, 1844, Story, in the matter of *Bellows and Peck*, (3 Story, 428,) re-affirmed his opinion in *ex parte Foster*, and replied to that of Parker in *Kittredge v. Warren* in language and with an emphasis which showed how deeply his self-love had been wounded. At the July term, 1844, Parker, again speaking for the supreme court, responded in a masterly opinion in *Kittredge v. Emerson*, 15 N. H. 227-280. In closing, he replied to Story's threat with the distinct notice that the state court would protect its jurisdiction and officers at all hazards, and intimated that it might not be entirely safe for those who might attempt to execute the threat. The state court ordered judgment for the plaintiff. Nobody attempted to interfere with the execu-

tion of its mandate. On June 5, 1844, the governor of New Hampshire, in his message, called the attention of the legislature, then in session, to the controversy, and the perils that must flow from it.

On December 26, 1844, the House, sweeping away party lines, almost unanimously passed a joint resolution sustaining "the firm and decided stand" of the court "in opposition to the unwarrantable and dangerous assumptions of the Circuit Court of the United States." On December 31, 1844, Story responded to Parker and the state government with his opinion in *ex parte* Christy, 3 How., 292, dragging the majority of the Supreme Court of the United States into this controversy between himself and Judge Parker, in an opinion upon a point which that court could not properly consider in that case. This was a 'motion' made in the Federal Supreme Court in behalf of the City Bank of New Orleans, that a writ of prohibition issue to the United States District Court of Louisiana, restraining it from proceeding further in Christy's case. It was so evident that no power had been conferred upon the supreme court to issue such a writ in such a case, that even Story decided in five lines, without either reasoning or the citation of authorities, that the court had no jurisdiction, but he nevertheless went on with an opinion of fourteen pages, which is a marvel for its ability and obscurity, as well as its contradictory character, in attempting to show that if the court had had jurisdiction, Judge Parker, in his opinion, was very much in error. Story has taken pains in his private correspondence to show us, beyond a doubt, what his purpose was in writing this opinion.

In his letter of January 1, 1845, to his son, he says: "Yesterday I delivered the opinion of the court in a great bankrupt case from New Orleans, embracing the question of the nature and extent of the jurisdiction of the district court in matters of bankruptcy. It was an elaborate review of the whole statute, and we sustained the jurisdiction of the District Court over all matters whatsoever, and recognized (as, indeed, was one of the points,) the right of the court to grant an injunction to proceedings and suits in the state courts. *The opinion*

covers the whole ground in ex parte Foster, and also in the New Hampshire cases, which have been so stoutly contested in the state courts. * * * I took great pains about it, and the court fully confirmed all my views. Judge Catron alone dissented."

Judge Catron, with whom Judge Daniel concurred, administered to Story a dignified but stinging rebuke for the course taken by him in his opinion. He said: "By the fourteenth section of the judiciary act, this court has power to issue writs proper and necessary for the exercise of its jurisdiction; having no jurisdiction in any given case, it can issue no writ. That it has none to revise the proceedings of a bankrupt court, is our unanimous opinion. So far we adjudge, and in this I concur. For further views why the prohibition cannot issue, I refer to the conclusion of the principal opinion. But a majority of my brethren see proper to go further, and express their views at large on the jurisdiction of the bankrupt court. In this course I cannot concur; perhaps it is the result of timidity, growing out of long established judicial habits in courts of error elsewhere, never to hazard an opinion when no case was before the court, and when that opinion might be justly arraigned as extra judicial, and a mere *dictum* by courts and lawyers; be partly disregarded while I was living, and almost certainly be denounced as undue assumption when I was no more; a measure of disregard awarded with an unsparing hand, here and elsewhere, to the *dicta* of state judges under similar circumstances. And it is due to the occasion and to myself to say that I have no doubt the *dicta* of this court will only be treated with becoming respect before the court itself so long as some of the judges who concurred in them are present on the bench, and afterwards be openly rejected as no authority—as they are not."

In *Peck v. Jenness*, July, 1845, 16 N. H. 516–537, Judge Parker, for obvious reasons, disregarded this opinion in *ex parte Christy*. In this case, (7 How. 612–626,) at the December term, 1848, four years after Story read his opinion in *ex parte Christy*, the Supreme Court of the United States unanimously decided that Parker was right, and Story wrong.

The written opinion to Webster, of December 25, 1833, (2

Life of Story, 155-158,) upon a variety of questions, raised by certain acts of the president and Mr. Taney, in the great bank war, is another illustration of the way in which, during his whole judicial life, he sowed on every hand his written and oral opinions upon questions he was likely to be called to decide as a judge. The harvest which these dragon's teeth produced was sometimes more perilous than armed men.

Contrary to the almost universal understanding, based mainly upon the argument put by counsel to intensify a point, the necessity and propriety of amending this college charter have been conceded by the leading trustees from a very early period. John Wheelock came from Yale, was a student there, and was familiar with the troubles of President Clap, which grew out of the attempt to secure the passage of an act by the legislature of Connecticut, in 1763, providing for the government of Yale and for the appointment of a "commission of visitation," to rectify abuses in the college, or report thereon to the General Assembly. In 1791, before the troubles which resulted in the exclusion of Wheelock from the board had arisen, its controlling minds, with Wheelock and Olcott at their head, of their own accord, adopted a plan by which the Senate and the House were to have "some" share in the government of Dartmouth College. We have already alluded to the projects for legislative interference while the struggle between Wheelock and his adversaries was going on in the board, and to the fact that almost as soon as the majority of the trustees had obtained a decision in their favor, they proposed to have the legislature alter this charter by creating a Board of Overseers, etc.; and that Webster, probably having in mind the argument of Parsons on that point, to which we shall hereafter advert, advised against the scheme as one "not without danger." The truth is, the trustees were willing any amendments should be made to the charter, if so framed that they could exclude Wheelock and his friends from any share in the government of the college, and could retain possession for themselves and their friends. On June 19, 1816, while the

act, subsequently passed, was pending before the Legislature, Thompson, Paine, and McFarland, three of the leading trustees, addressed to that body a remonstrance against its passage, covering nearly eight pages in print. As might have been expected from the ability of the draughtsman, the objections to the bill were stated with great force and clearness. Among other things, they said: "The charter of Dartmouth College vests certain rights of property, for particular uses, in the trustees. The sovereign power, having once made this grant, cannot, as the trustees humbly conceive, divest them of it so long as they exercise their trust in conformity to the true intent and meaning of the charter. They respectfully call to the view of the Honorable Legislature that Dartmouth College was not founded by the then existing sovereign. It was founded and endowed by liberal individuals; and the charter was given by the sovereign, to perpetuate the application of the property conformably to the design of the donors. If the property has been misapplied, if there has been any abuse of power upon the part of the trustees, they are fully sensible of their high responsibility; but they have always believed, and still believe, that a sound construction of the powers granted to the Legislature gives them, in this case, only the right to order, for good cause, a prosecution in the judicial courts. A different course effectually blends judicial and legislative powers, and constitutes the Legislature a judicial tribunal. * * *

"Whilst the undersigned deem it their indispensable duty to remonstrate in the most respectful terms against the passage of the bill referred to, they have no objection, and they have no reason to believe their fellow trustees have any objection, to the passage of a law connecting the government of the state with that of the college, and creating every salutary check and restraint upon the official conduct of the trustees and their successors that can be reasonably required; and, with respectful deference, they would propose the following outlines of a plan for that purpose:

"The counsellors and senators of New Hampshire, together with the Speaker of the House of Representatives for the

time being, shall constitute a Board of Overseers of Dartmouth College, any ten of whom shall be a quorum for transacting business. The overseers shall meet annually at the college on the day preceding commencement. They shall have an independent right to organize their own body and to form their own rules; but as soon as they shall have organized themselves, they shall give information thereof to the trustees. Whenever any vote shall have been passed by the trustees, it shall be communicated to the overseers, and shall not have effect until it shall have the concurrence of the overseers; provided, nevertheless, that if at any meeting a quorum of the overseers shall not be formed, the trustees shall have full power to confer degrees in the same manner as though there were no overseers, and also to appoint trustees or other officers, (not a president or professor,) and to enact such laws as the interests of the institution shall indispensably require; but no law passed by the trustees shall in such case have force longer than until the next annual meeting of the boards, unless it shall then be approved by the overseers. Neither of the boards shall adjourn, except from day to day, without the consent of the other. It shall be the duty of the president of the college, whenever, in his opinion, the interests of the institution shall require it, or whenever requested thereto by three trustees, or three overseers, to call special meetings of both boards, causing notice to be given in writing to each trustee and overseer of the time and place; but no meeting of one board shall ever be called except at the same time and place with the other. It shall be the duty of the president of the college annually, in the month of May, to transmit to His Excellency the Governor a full and particular account of the state of the funds, the number of students and their progress, and generally the state and condition of the college."

Aside from Story's passion, to which we have already referred, of gathering every item of legal, political, and judicial gossip, he had the amplest facilities for becoming perfectly familiar with the history of these proceedings. Upon the passage of the act, Governor Plumer appointed his friend

Story, Benjamin W. Crowninshield, of Salem, Story's neighbor, and William Gray, the famous Boston merchant, members of the Board of Overseers.

We have in a previous paper alluded to the three opinions of Story; 1, that given to Bartlett in favor of the university; 2, that in favor of the trustees upon what was known as the Parsons' view, relied upon by Webster; 3, that in favor of the trustees upon the obligation clause.

Webster instituted these suits in the circuit court, which cost so much labor, vexation, and expense, mainly because he was confident of carrying Story with him on the Parsons' view, but not upon the third ground.

Harvard University was chartered in 1636. The act of 1642 made the governor, deputy governor, president of the college, magistrates, teaching elders, etc., members of the Board of Overseers. When the constitution of the state was formed, the university was put under the protection of the state by virtue of certain provisions incorporated therein; and the grant of 1636 was "ratified and confirmed" thereby, with the proviso "that nothing herein shall be construed to prevent the legislature of this commonwealth from making such alterations in the government of the said university as shall be conducive to its advantage, and the interest of the republic of letters, in as full a manner as might have been done by the legislature of the late Province of the Massachusetts Bay."

Judge Parsons became a Fellow of Harvard in 1806. Soon after he framed a law making the alterations in the charter contemplated by the eminent jurist who penned the proviso. The bill passed March 6, 1810; was formally accepted by the corporation, March 16, 1810, and by the Board of Overseers, April 12, 1810. This act was repealed and the old board restored by the act of February 29, 1812. In 1814 this repealing act was repealed, and the act of 1810 revived, with the proviso that the Senate should be added to the thirty elective members for which the act provided.

From the time he became a Fellow till shortly before his death, Parsons was the controlling spirit; and during the

troubles which followed the passage of the act of 1810, argued the cause of the university.

The counsel for the trustees in the Dartmouth College case were as familiar with the history of the troubles at Harvard and the argument of Parsons as Story.

Charles Marsh, as we have already said, was one of the trustees, and the one through whom Mr. Webster proposed to bring one of the college causes in the circuit court. In 1816 he prepared some "minutes of authorities and observations in relation to the affairs of Dartmo' College." These minutes cover twelve pages of unruled foolscap, very closely and compactly written. Several pages are occupied with reasoning and authorities tending to sustain the two first positions taken by Mason in the state court. Two pages are taken up in a not very successful attempt to distinguish the case of Gresham College, cited by Governor Plumer in his message, from that of Dartmouth College. He then refers to the case of Harvard College; says that Parsons "is said to have penned this act," and relies upon his "opinion." He then discusses at length the power of the Legislature over cities, etc., and argues that "towns, having no such power, [the power of perpetual succession,] are not, therefore, in any strict sense, corporations," and adds that, if towns are corporations, the inhabitants of a new town, created out of an old town, or old ones, would not be bound by a new charter unless they saw fit to accept it. Near the close, under the date of May 16, 1817, Marsh says: "The foregoing remarks & references were made *nearly a year ago* and are now deemed of no importance except for the purpose of facilitating a recurrence to authorities—since that time the case of Fletcher vs. Peck in 6th Cranch; & New Jersey v. Wilson in 7th of Cranch, have been consulted; & are deemed to be decisions in point." We copy from the identical minutes of Marsh and the dim, time-stained argument of Parsons, used by Judge Smith and his eminent associates in preparing their arguments in Judge Woodward's case. The argument of Parsons "as to visitors of Harvard College," according to the filing of Judge Smith, is as follows:

"1. The office of Visitor.

"2. His power & duties.

"3. Who is the visitor of Harvard College?

"4. The extent of the power reserved to the Legislature in the Constitution of the Commonwealth to alter the Gov't of the College in as full a manner as it could have been altered by the Legislature of the Province.

"1. The office of Visitor is at common law arising from the lawful endowment of any charity either by the Sovereign or any private person.

"If a private person endow a charity it is inherent to his right of property to determine to what uses and in what manner the charity may be applied, and for these purposes provision may be made by his own statutes which are considered as the foundation of the endowment. He may appoint a Visitor to see that these statutes are duly executed. If the founder do not appoint a Visitor he and his heirs are of course Visitors. When the founder has made the endowment of his charity and appointed a Visitor he after that ceases to have any control over it his property having vested in the grantees, subject to the visitation of the Visitor whom he has designated & who is substituted in the room of the founder. He can therefore provide no new statutes altering the former uses of his donation, unless he has reserved such power to himself in his original foundation nor can he revoke the visitatorial power which he has delegated; as it may affect the interest which is vested in the grantees. But the founder not having appointed a visitor may with the assent of the grantees make what alterations may be thought proper in the appropriation of his own donation, but not in donations made to the same charity by other persons who have expressly limited their uses and alterations may also be made in the power of visitation by authority of the Legislature and by consent of the grantees and the visitor who so far stands in the place of the founder.

"2. The power and duties of the visitor are incident to him at common law, subject to the restrictions and qualifications pointed out by the statutes of the founder. It pertains

to the office of visitor to see that the statutes of the founder are executed and also to exercise such powers as result from his will. If the founder instead of framing particular statutes for the management of his donation should authorize the corporation in whom the same is vested to make by laws for carrying into effect and regulating the charity with the assent of the visitor then such by laws have the force of the statutes made by the founder.

“3. The visitor of H. College. No visitor of Harvard College can be considered as existing until a donation was made by some person or public body for the purpose of founding the College and such donation cannot be made till there are proper persons to take the same. The General Court appropriated property for the purpose of founding a College; but did not grant the same to any persons whatever the property remaining the property of the colony and being managed by a Committee appointed by the General Court.

“This Committee being found an inconvenient body the Court give the trust to the Governor, Deputy Governor and magistrates & the teaching elders of the six neighbouring towns by the name of overseers, with power to manage the funds subject to the will of the donors. In the act appointing the overseers it is ordained that the greater number present at any meeting the number necessary to constitute a meeting not not being prescribed may make & establish any orders, statutes & constitutions subject however to an appeal to the whole body of overseers, who if they refuse to sustain such appeal or act thereon shall stand accountable to the next General Court.

“Soon after the Creation of the overseers on application of Mr. H. Dunster the President of the College the General Court were induced to take measure for founding a College by constituting a Corporation in whom was invested the property belonging to the College with power to manage the same agreeably to the will of the donors and for that purpose to make orders and by laws, but which were of no force until allowed by the overseers. The last provision being supposed to be impracticable in the Government of the College the Cor-

poration did not exercise their powers until the granting an additional Charter in 1657 (?) after this the College appears to be completely founded having a corporation in whom the funds vested with a power to make orders and by laws, so that the will of the donor was observed and subject to the control of the overseers, as a board of Visitors, who might disallow the orders and by laws made by the corporation. The General Court of the Colony therefore were the founder of the College and instead of forming particular statutes for the College which they founded they constituted a Corporation with power to make orders and by laws for the government of the College compatible with the will of any donor & subject to the disallowance of the overseers. And the doings of a meeting of the overseers called by notice to those members living in the six neighbouring towns are by the last Charter or appendix of 1657 finally valid without any ultimate Control being reserved to the General Court.

“The Governors or Overseers appointed to any Charitable institution by the founder are in fact the visitors thereof although they may not be designated by the name of Visitors. The College as observed now appears to be regularly founded having a Corporation to take and manage the property, subject to visitors specially appointed by the founder, who has parted not only with his property but with all control over it. What control however the General Court of the old Colony of Massachusetts Bay might in fact claim or exercise either over the funds, which they had given away or the visitatorial power which they had parted with it is not now necessary to inquire. It is sufficient to say that this foundation with this visitatorial power existed so long as that General Court—that the Court never did in fact repeal or annul this foundation or revoke the power of visitation constituted as here mentioned. The occasional interference of the Colonial General Court, after the foundation was practised either with the assent of the College or is to be considered as an assumption of power not belonging to it for in fact that Court claimed to exercise all the powers of Gov't Legislature Executive and judicial.

“Upon the repeal of the old Colony Charter & the granting of the Provincial Charter the Governor Deputy Gov & magistrates were succeeded by the Gov'r Lieut Govr and Council as their successors in office and the power of Visitation remained in the same body until new successors were appointed by the Constitution notwithstanding several attempts to give the college a new foundation were made by the interests of its friends with the concurrence of the College.

“4. What power the Legislature of the Province had to alter the Govt of the College requires now to be considered. The Charter that gave existence to the Provincial Legislature by confirming the property of the College necessarily confirmed the College and confirmed the property in the College by such tenure & on such conditions as those by which it was before holden, one of which was to be subject to a controul in the disposition of that property by a body of visitors and their successors appointed by the founder. If the Legislature had any authority to alter the Gov't of the College without the consent of the visitors and Corporation it must be either by virtue of some visitatorial power remaining in it or by some judicial act to be passed by it or by its Legislative authority. As to its having visitatorial power remaining, there is no color for it, as the founder reserved none to himself—as to a Judicial act the Provincial Legislature were not competent to pass any no judicial power having been granted in the Charter. If therefore the Legislature could alter the Gov't of the College it must be by virtue of its Legislative authority. The Legislative power of every State must be such as it can lawfully exercise according to its constitution not a mere arbitrary or despotic will which may prevail because power is not synonymous with right.

“It will not be pretended that the Legislature could divest the Corporation of the property given it by the founder and other donors, nor will it be contended that the Legislature by any lawful act could alter the uses for which the property was so given or by repealing the Charter of incorporation could defeat all those donations and render them void

or could alter the constitution of the Corporation by adding to its members or changeing its powers; for if this were admitted they might virtually repeal the Charter of incorporation which vests the property and the powers therein designated in the corporation and their successors the law of succession being established in the Charter.

“It remains to consider whether without consent the Legislature could rightfully change the visitors of the College and appoint new visitors not appointed by the founder. The founder had the same power at law to appoint visitors of his Charity that he had to make the donation and prescribe the use, and the visitors have in them a vested right of visitation of which they cannot be deprived without their consent any more than of any other vested right. The Corporation also have an interest in the exercise of the right because by the exercise of it can the powers of the Corporation alone be controlled. And it may be supposed that a corporation might be willing to take the management of a Charity subject to a particular visitation which they might refuse under another visitation as well as that donors might be induced from confidence in the existing visitatorial power to make donations which otherwise they might decline. The visitatorial power is therefore so connected with the Charity of its management that it seems impossible that the Legislature can have a power over the former without having it over the latter which is not contended. But if the visitors and Corporation are disposed to consent to a substitution of other persons as visitors yet it cannot be done unless authorized by the Legislature but being so authorized it may lawfully be done because it is done by the consent of all the parties interested. If however the doctrine should be admitted that the Provincial Legislature had the singular power of altering the Government of the College without consent yet if instead of exercising that power they had in fact introduced into the visitation new visitors with the consent of the former visitors and the Corporation it is extremely difficult to conceive by what legitimate authority the Legislature could afterwards deprive those new Visitors of the rights of Visita-

tion thus lawfully vested in them. To admit this power of deprivation thus exercised would be giving to the Provincial Legislature greater power than they would have possessed if they had been founders of College & and at the foundation had specially appointed as visitors the persons thus deprived. Admitting therefore the power reserved to the Legislature of making such alteration in the Government of the College as could have been made by the Legislature of the late Province of Massachusetts Bay yet under this admission no alteration could be made in the Government but with consent of the overseers & Corporation and but for the reservation in the proviso no alteration could ever be made even with consent as it would have been deemed repugnant to to the Constitution which established absolutely the Government of the College."

A comparison of this powerful, terse, and pointed argument of Parsons with the opinion of Story, shows not only a radical difference in the structure of the minds of the two men, but that the latter shone with a borrowed light. Two things are especially noticeable in this argument of Parsons: From his intimate acquaintance with Dane, the history of the times, and the great men who participated in the Federal Convention, no man in Massachusetts was more capable of comprehending the meaning of the obligation clause than he, yet he passed it by in this argument as if the thought never occurred to him that it had any application. There is but one conclusion—that it had none. The other is, that, independent of the proviso, the charter could not be altered by the legislature even with the consent of the overseers and corporation.

Story, "in the end," supplemented the opinion that the charter was protected by the obligation clause. This was the natural result of his new views, adopted after his elevation to the bench, under the influence of the seductive power of Marshall and the promptings of his vast ambition, that the controlling purpose of this clause, as of many others, was *not* to protect private rights, but to subserve great political ends, or, as it is put by Webster, in his celebrated argument in

Ogden v. Saunders, which Story endorsed, if he did not originate: "The inquiry then recurs, whether the law in question be such a law as the legislature of New York had authority to pass. The question is general. We differ from our learned adversaries on general principles. *We differ as to the main scope and end of this constitutional provision. They think it entirely remedial; we regard it as preventive.* They think it adopted to procure redress for violated private rights; to us it seems intended to guard against great public mischiefs. They argue it as if it were designed as an indemnity or protection for injured private rights in individual cases of *meum* and *tuum*; we look upon it as a great political provision, favorable to the commerce and credit of the whole country. Certainly we do not deny its application to cases of violated private right. Such cases are clearly and unquestionably within its operation. Still, we think its main scope to be general and political." And in his recapitulation, Webster says: "Sixthly, that upon any other construction, one great political object of the constitution will fail of its accomplishment."

Marshall, though firm and decided, was by nature a moderate. Circumstances, personal and political, intensified his views as he advanced in life. Jay and Jefferson were the antipodes in American politics. In 1785, Jay thus expressed his convictions: "It is my first wish to see the United States assume and merit the character of *one great nation*, whose territory is divided into different states merely for more convenient government, and the more easy and prompt administration of justice; *just as* our several states are divided into counties and townships for the like purposes." Just before the Federal Convention which framed the constitution met, he wrote to General Washington: "What powers should be granted to the government so constituted is a question which deserves much thought. *I think the more the better*; the states retaining only so much as may be necessary for domestic purposes, and all their principal officers, civil and military, being commissioned and removable by the national government." In his opinion in *Chisholm v. Georgia*, and

subsequently, Jay adhered to the same general views. A few extracts from Story's private correspondence will show how fully, after his lurch from the school of Jefferson, he shared the views of Jay. In his letter of February 22, 1815, to Williams, Story says: "Let us extend the national authority over the whole extent of power given by the constitution. Let us have great military and naval schools; an adequate regular army; the broad foundations laid of a permanent navy; a national bank; a national system of bankruptcy; a great navigation act; a general survey of our ports, and appointments of port-wardens and pilots; judicial courts, which shall embrace the whole constitutional powers; national notaries; public and national justices of the peace, for the commercial and national concerns of the United States. By such enlarged and liberal institutions, the government of the United States will be endeared to the people, and the factions of the great states will be rendered harmless."

In his letter of December 13, 1815, to the reporter, Wheaton, in relation to the bankrupt law, etc., he says: "I hope you will follow up the blow by vindicating the necessity of establishing other great national institutions; the extension of the jurisdiction of the courts of the United States over the whole extent contemplated in the constitution; the appointment of national notaries public and national justices of the peace; national port-wardens and pilots for all the ports of the United States; a national bank and national bankrupt laws. I have meditated much on all these subjects, and have the details, in a considerable degree, arranged in my mind. And, once for all, I most sincerely hope that a *national newspaper* may be established at Washington, which, for its talents and taste, shall entitle itself to the respect of the nation, and preserve the dignity of the government."

2 Life of Story, 254-271.

We have already commented upon some of the peculiarly latitudinarian opinions given by Story to Governor Plumer. Young Story, in his life of his father, from which we have quoted, after commenting upon the case of *Martin v. Hunter's Lessee*, says:

“This was the first great constitutional judgment delivered by my father. To this department of the law he had given little study during his practice at the bar, and, although he had always avowed himself to be a disciple of Washington, yet, as the views of the party to which he belonged were widely different from those entertained by the illustrious Chief Justice Marshall, no small curiosity was felt by his friends as to the determination his mind should take on great constitutional questions. The Republicans were strict constructionists of the constitution, narrowing down the powers of the Federal government to the express and exact terms of that instrument, while the Federalists claimed a broader and more liberal exposition in favor of the United States.” * *
“Upon taking his seat on the bench, my father devoted himself to this branch of the law, and the result was a cordial adherence to the views of Marshall, whom he considered, then and ever afterwards, as the expounder of the true principles of the constitution. Nor did this indicate so much a *change* as a *formation* of opinion, and it is no slight indication of his independence and emancipation from the influence of party that he resigned, upon careful study and examination into the history and principles of the constitution, his early prejudices in favor of Mr. Jefferson’s abstractions for the clear and practical doctrines of Marshall.” * * * “His was the consistency of truth—to the living thought of the present, not to the dead opinion of the past.”

The partial pen of the son has done injustice to his father. Story and Marshall sometimes rode abreast; sometimes Story, like Johnson, concurred in the opinions and judgments of Marshall, from which he dissented, as in the case, *United States v. Bevens*, 3 Wheat. 336, and sometimes, as in the college causes and the case of the Cherokee Nation, he far outran the chief justice. It is not true that this astute politician and learned lawyer was without opinions upon great constitutional questions, or that he had failed to study them before his accession to the bench. In the broils and discussions, legal and political, which grew out of the embargo, restrictive policy, etc., he had scaled the heights and meas-

ured the depths of the great powers conferred upon the general government over commerce. The same is true of the treaty-making power, and the provisions in relation to treason, as well as the great powers which give control over the purse and sword of the nation. On February 17, 1810, he argued the great Georgia case before the Supreme Court of the United States with consummate ability, and he did not do this till after he had carefully studied the obligation clause.

The nominal hearing in the causes which had been sent up from his circuit and remanded, was had before Story on May 27, 1819. Webster, in his letter of May 30, 1819, from which we have already quoted, says: "James T. Austin, Esq., in behalf of the university, presented the new facts to Judge Story on Thursday."

The new facts were precisely what Webster "expected." What were they? Let Judge Smith, his associate, answer. In his letter to President Brown of December 18, 1818, Smith says: "Immediately after I sent to the post-office my letter to you of yesterday, Mr. Sullivan and Mr. Ich Bartlett, with Mr. Upham, of the university, called on me with a bundle of papers, to be certified as authentic, and to be used in the argument of the college causes, if adjudged pertinent or proper evidence." These papers were termed by him "the Wheelock papers." We have, together with this letter, the original schedule in the handwriting of Judge Smith. The papers are ranged in the schedule under numerous heads, commencing with the printed "narratives" of the elder Wheelock, which of themselves make quite a volume, and ending with an abstract from his will. The schedule covers numerous letters, records, and papers, including those in the matter of Landaff. The written headings alone cover nine long pages. We have referred to this evidence in previous papers, but made no attempt to summarize it with exactness and precision. We shall now refer briefly to some of the salient points. Wheelock proposed to locate the school in New Hampshire if he could obtain from Governor Wentworth a suitable grant of land and a charter. On July 20, 1768, Wheelock commissioned Ebenezer Cleveland to explore the province with

reference to the location, and, in effect, to ascertain what grant, if any, would be made. In his report made in December, 1768, which describes the town of Landaff, sets out its situation, and that the governor was ready to make a grant, he says: "I waited upon His Excellency, John Wentworth, Esq., Governor of New Hampshire. He appeared very friendly to the design, promised to grant a township six miles square to the use of the school, provided it should be fixed in that province, and that he would use his influence that His Majesty should give the quit rents to the school free from charge of fees, except from surveying." Wheelock relied upon this promise, and caused the school to be located at Hanover; and the governor granted Landaff, comprising 24,000 acres of land, according to this agreement. After they had occupied this territory for some time, questions arose as to the validity of the judgment of forfeiture which preceded this grant, and the trustees, declining to enter into litigation, lost the grant in 1787; but in 1789 the state replaced it by others already referred to.

Whatever it may be in law, this grant was, in fact, the foundation of the institution, for without it the school would have gone elsewhere. It is obvious that if the charter granted by Governor Wentworth was, by a fiction of law, the act of the king, the promise of the same governor, in the same capacity, with reference to the same matter and the subsequent grant, was equally the act of the king; nor can it change the legal aspect that the grant was not actually made until the legal entity had been created, which could accept it. If the school and the college were identical, as Marshall assumes, the king, within the principles laid down in the case of Sutton's Hospital, was the founder in both senses, and his power, by the Revolution, passed to the legislature of New Hampshire. If the promise and grant are to be construed to be made to the college as such, the same result would follow.

Wheelock, in his "Narrative," says: "SOMETIME after those Boys came, [December 18, 1754,] the Affair appearing with an agreeable Aspect, it being then a Time of profound

Peace in this Country, I represented the Affair to Colonel *Elisha Williams*, Esq; late Rector of *Yale-College*, and to the Rev'd Messrs *Samuel Moseley* of *Windham*, and *Benjamin Pomeroy* of *Hebron*, and invited them to join me; they readily accepted the Invitation; and a Gentleman learned in the Law supposed there might be such an Incorporation among ourselves as might fully answer our Purpose. And Mr. *Joshua Moor*, late of *Mansfield*, deceased, appeared to give a small Tenement in this Place, for the Foundation, Use and Support of a Charity-School, for the Education of *Indian Youth*, &c. But it pleased God to take the good Colonel from an unthankful World soon after the Covenant was made and executed, and thus deprived us of the Benefit of his singular Learning, Piety and Zeal in the Affair. Notwithstanding, a Subscription was soon made of near £.500 lawful Money, towards a Fund for the Support of it at 6 per Cent. But several Gentlemen of the Law, doubting of the Validity and Sufficiency of such an Incorporation; several steps were taken to obtain the Royal Favour of a Charter, but none effectual." After setting forth, in detail, the offers made if he would locate the school in other jurisdictions, and what was promised if it should be located in New Hampshire, and stating the promised grant of land, as by "THE King's most gracious Majesty, by advice of his Excellency John Wentworth, Esq; his Majesty's Governor of the province of New Hampshire, and of his council, a Charter of the township of Landaff, about 24,000 acres," which was followed by a printed list of subscriptions several pages in length, says, in relation to the charter, "My next business was to secure the generous donations made to it in said province. And in order thereto, having consulted the principal gentlemen of the law, in this and the neighbouring provinces, who unanimously advised that an incorporation, if it could be obtained was the only course I could take that would be safe for the institution, * * * I therefore fixed upon this as my next and immediate object." * * * "and accordingly I employed a proper agent to solicit his Excellency Governor Wentworth, whom God has raised up to serve

the interests of the great Redeemer in his province; and who appears to be unwearied in doing good, and by him have obtained a generous charter, by the name of DARTMOUTH COLLEGE, endowed with all the powers, and privileges of a university, with which this school is connected, and to which it is designed to be subservient, and is by said charter invested with the donations made to it in said province: though the school itself remains under the same jurisdiction and patronage as before." * * * "The charter of this school requiring the meeting of the corporation within a year from the date of it, I did therefore as was requisite to save the forfeiture of it, call a meeting of the trustees on the 22d day of October.—At which meeting it was proposed to the trustees whether something could not be done by them to perpetuate the name, and deed of Mr. Joshua Moor, late of Mansfield in Connecticut deceas'd; who was the first considerable benefactor to the school when it was obscure, and by many esteem'd contemptible, and after taking the matter into consideration, it was resolved that they had no right by the charter to do anything in that matter, *and that the charter gives the trustees no right of jurisdiction but over the college; and that the school remains still under the same patronage, authority and jurisdiction, as it was under before the charter was given.*"

One of the rules established for the government of the institution provided: "Lastly, That this Indian charity school, connected with Dartmouth-College, be constantly hereafter, and forever, called and known by the name of *Moor's School.*" * * * "And I would also take this opportunity to advise the generous subscribers, in the Colony of Connecticut, and province of Massachusetts Bay, &c. who have not yet paid their subscriptions made in the year 1755, and following, for the only use, benefit and support of this school, (the yearly interest whereof was payable on condition, and so long as the school should be continued, *and the principal to become payable as soon as the school should become a body corporate, and thereby capable of the tenure and disposal of land, &c.*) that I suppose the said subscriptions are now become payable by this

incorporation, according to the true design, and intention of the pious subscribers." * * * "As to the surmises and prejudices thereby raised at a distance, that I have changed my object, and that the charitable donations made for the use of this school and missionaries are in whole or part perverted to my own, or some other English design, &c. were it not for the operation of these slanders beyond my acquaintance, I should not think it worth my pains to say a word about them." * * *

"I have invariably kept the same object in view, and there has not been a step taken, nor a stroke struck by me or my order, in the whole affair of my removing, settling and accommodating myself, family, and this seminary in this wilderness, but what has been meant, calculated, devised, and designed, to be in direct subserviency to my first object, viz. the gospelizing the Indians; *nor has there been anything done here*, (excepting what I or others have done at our own expense,) *but it must have been done if an English-college, had never been thought of. The Indians are the first object in the charter, and the first object designed by all the lands secured thereby, and of many other subscriptions and donations made to it.* And there never has been from the first to this hour, directly or indirectly, one farthing of the money collected on either side the water, for the use of my Indian school, or for the support of missionaries, been improved for my own, or my family's support, or for any other purpose, with my knowledge or consent." The narrative further sets out the circumstances under which £500 were given by the general assembly of the province, £200 sterling by the king, the Phillips donation, and others. In his last will, Wheelock says: "I have founded on my own tenement and at my own expense an Indian Charity school, now called Moor's Charity School;" sets out that he is the founder thereof, "and as founder and proprietor thereof," "as well as by grant in said charter," undertakes "to dispose of said school and all donations and grants of land and other interests any way given or granted for the benefit of said school," and appointed his son his "successor in said office of president of my Indian

charity school and Dartmouth College," etc. In previous papers we have set out many other historical facts having the same general bearing. These are some of the new facts of which Webster, in his letter to Mason of April 13, 1819, already quoted, said: "I flatter myself the judge [Story] will tell the defendants that the new facts which they talk of were presented to the minds of the judges at Washington, and that, if all proved, they would not have the least effect on the opinion of any judge." This was weeks before the facts were put in evidence before Story. If so presented to the minds of the judges, it must have been months before the formal hearing before him. In his letter to Mason of February 23, 1819, Webster says: "As to their facts, which they say are new, they will, I apprehend, be told that, if admitted, they would not alter the result; and, in the next place, that the court considers the recital of the charter as conclusive upon the facts contained in it." In Webster's letter to Brown of May 30, 1819, just quoted, he says: "The judge said he saw nothing to vary at all the case, as it had been considered and decided. None of these 'facts,' if true, changed the ground; nor did he see any the least contradiction between any of these facts and the recitals of the charter."

Some of Story's reasons undoubtedly are to be found in *Allen v. McKeen*, 1 Sumner, 276-318. Story's decision in the college causes, in effect, annihilated Dartmouth University, handed over the munificent bequest which John Wheelock had made to it to a New Jersey college, (as is said, to Princeton,) deposed William Allen, the president, and drove him from Hanover.

In December, 1819, the same Dr. Allen became the president of Bowdoin College, at Brunswick, Maine, which office he held, in legal contemplation, till 1839. This college was chartered by the Legislature of Massachusetts, June 24, 1794. This act provided for establishing the college; put it under the government of two bodies corporate; made the president, treasurer, and eleven others, one of these bodies, with perpetual succession; provided for the creation of a Board of Overseers; gave the corporation power to declare the tenure

and duties of certain officers, with power to remove trustees, etc. The sixteenth section gave the legislature authority to "grant any further powers to, or alter, limit, annul, or restrain, any of the powers by this act vested in the corporation, as shall be judged necessary to promote the best interests of said college." The next section granted to the college five townships, six miles square, to be laid out of any unappropriated lands of the commonwealth in the then district of Maine, with the usual provisions that the corporation might acquire property and take donations, etc.

The lands granted vested in the corporation, and donations were given it from time to time by private individuals. The college boards were duly organized under the charter, and the college went into operation in the year 1801. In July, 1801, the corporation fixed the salary of the president at \$1,000 *per annum*, payable quarterly. In 1805 this was raised to \$1,200. On November 4, 1801, the board declared the tenure of the office of president to be "during good behavior." The by-laws required every candidate to pay five dollars to the treasurer for the president, and a like fee for every medical degree.

In May, 1820, Dr. Allen assumed the duties of this office with this known tenure, and the salary and perquisites annexed. In the same month the boards passed a vote reciting the clause in the constitution of Maine as to endowments, and declared that their consent be given that the right to enlarge, limit, or restrain the powers given by the charter might be vested in the Legislature of Maine, and steps were taken to secure endowments. A variety of acts were subsequently passed by the legislature, which it is unnecessary to consider. On March 31, 1831, an act passed, aimed directly at Dr. Allen, providing "that no person holding the office or place of president in any college in this state shall hold said office or place beyond the day of the next commencement of the college in which he holds the same, unless he shall be reëlected. And no person shall be elected or reëlected to the office or place of president unless he shall receive in each board two-thirds of all the votes given in the question

of his election. And every person elected to said office or place after the passing of this act shall be liable to be removed *at the pleasure of the Board of Trustees, or Board of Trustees and Overseers*, which shall elect him." "That the fees paid for any diploma, or medical or academical degree, etc., shall be paid into the treasury for the use of the college, and no part shall be received by any officer as a perquisite of office."

The boards in September, 1831, duly voted "that they acquiesce in said act, and will now, etc., proceed to carry the provisions thereof into effect." The Board of Trustees gave due notice to Dr. Allen, and then proceeded to elect a president; but no candidate having a majority of votes, no choice was made, and the college remained without any acknowledged president until the question was determined.

For some inscrutable reason, Dr. Allen brought assumpsit for money had and received, not against the corporation, but the treasurer of the college, for the salary and perquisites of office due him, as he claimed, notwithstanding his ejection from office under the vote of the boards in September, 1831. Story decided that he could recover the perquisites in this suit, and affirmed the principle which lay at the foundation of his opinion to Plumer in relation to the judiciary act of 1813, and avowed by him in his opinion in the college causes, that an office so held was a contract protected by the obligation clause; but that for the breach of that contract he must proceed, not against the treasurer, but his master, the corporation. Dr. Allen was not only the son-in-law of John Wheelock, but his confidant and one of his principal advisers in the troubles which preceded, as well as those which followed, the removal of Wheelock by the trustees. He was familiar with the "inside history" of the causes and Story's position in reference to them. Allen and Dr. Perkins, to whose week's conference with Pinkney we have referred, were the principal managers of the college causes on the university side after Wheelock's death. Allen went to his grave with the conviction, still shared by Wheelock's descendants, that a great wrong had been perpetrated

under the color of a judicial decision. The occasion was distasteful to Allen, but he undoubtedly took pleasure in compelling Story to decide in the case between him and Bowdoin the same question which he had nominally decided in May, 1819, in the college causes. If he won, he got his perquisites and the arrears of his salary, established his right to the office, defeated the purpose of the legislature, and emasculated the power of his personal and political enemies in the boards; if he lost, it was the vindication of himself and Wheelock and the university, and the condemnation of Story. The reluctance with which Story met this issue is but faintly shown by his "outline" and "opinion" in this case. In closing his opinion he says: "I have now finished all that is necessary to be said for the decision of this cause. But I cannot dismiss it without expressing my regret that it has ever come before the court, and that I have been deprived of the assistance of my learned brother, the district judge, in deciding it. If this court were permitted to have any choice as to the causes which should come before it, this is one of the last which it would desire to entertain. But no choice is left. This court is bound to a single duty, and that is to decide the causes brought before it according to law, leaving the consequences to fall as they may.

It is impossible, in any aspect of the case, not to feel that the decision is full of embarrassment. On the one hand, the importance of the vested rights and franchises of this literary institution has not been exaggerated; and, on the other hand, the extreme difficulty of successfully conducting any literary institution without the patronage and cordial support of the government, and under a head who may (however undeservedly) not enjoy its highest confidence, is not less obvious."

Allen v. McKeen was decided in May, 1833, fourteen years after the decision in the last of the college causes.

This opinion should be read as an explanation of the most important portions of the elaborate essay filed by Story with the reporter in Trustees v. Woodward. He says: "Independent, however, of this general ground, there is another of

great weight and importance, and that is that President Allen was in office under a lawful contract made with the boards, by which contract he was to hold that office during good behavior, with a fixed salary and certain fees annexed thereto. This was a contract for a valuable consideration, the obligation of which could not, consistently with the constitution of the United States, be impaired by the state legislature." The general doctrine of Story, to which, so far as appears, he consistently adhered from the time of his conference with Governor Plumer till his death—that filling an office was a contract protected by the Federal constitution—was overthrown by the Supreme Court in 1850, as it has been by every reputable state court that has passed upon it. We are not aware of any body that now endorses the theory of Story and Livingston in the college case, in which Marshall did not concur—that the marriage contract is within the scope of the obligation clause. He further says: "But if the acquiescence of the boards could be construed into an approval of the act, (as I think it ought not to be,) still that approval cannot give effect to an unconstitutional act. The legislature and the boards are not the only parties in interest upon such constitutional questions. The people have a deep and vested interest in maintaining all the constitutional limitations upon the exercise of legislative powers, and no private arrangements between such parties can supersede them."

Taken as it reads, this would seem to be in conflict with the opinions in the college case.

He thus states the great question of the case: "Is it (the charter) the erection of a private corporation for objects of a public nature, like other institutions for the general administration of charity? Or is it, in the *strict sense of law*, a public corporation, solely for public purposes, and controllable at will by the legislative power which erected it, or which has succeeded to the like authority?" He concedes that the college "is, in some sense, a public institution or corporation," and that this is the popular sense in which the language is commonly used. He then proceeds: "But in the sense of the law, a far more limited, as well as more exact, meaning is

intended by a public institution or corporation." This, in effect, decides not only that all corporations at common law were divided into two classes, public and private, but that the term public corporation is a technical phrase of the common law, to be construed in the narrow, strict sense usually put by courts upon the technical words of a penal code, while precisely the opposite construction is put upon the term private corporation. His subsequent endorsement of what has often been supposed a loose statement in his opinion in the college case, shows that he meant to assert that this rule was among "the most solid foundations of the common law." If we may not apply to this the remark of Walpole, we may at least that of Mr. Justice Campbell in *Jackson v. Steamboat Magnolia*, in respect to another opinion of Story: "The opinion * * * is celebrated for its research and remarkable, in my opinion, for its boldness in asserting novel conclusions, and the facility with which authentic historical evidence that contradicted them is disposed of." As if fearing that some attempt might be made to relax this rule, after quoting from his opinion in the college case, that towns, cities, parishes, and counties, existing for public political purposes only, may in many respects be "esteemed" public corporations, he quotes the following passages, which he says "had the approbation of the court;" "but, strictly speaking, public corporations are such only as are founded by the government for public purposes, *where the whole interests belong also to the government.*" * * * "That is, *where its whole interests and franchises are the exclusive property and domain of the government itself.*" He further says that a bank "whose stock is owned partly by private persons and partly by the government," is a private corporation, and adds in relation to Bowdoin: "The commonwealth of Massachusetts is its founder, having given it its original funds. But it is made capable of receiving, and has actually received, funds from the bounty of private donors."

Baron Wood, in his *Institutes*, upon abundant authority, says: "He who gives the first possessions is the founder of it, though they are but of small value; so that a common person may be founder, though the king shall afterwards

endow it with great possessions." It is enough to say that this duplex rule, by which a "public" corporation is construed with so much strictness and a "private" one with such "liberality," was never heard of by anybody before the college case. Taken in its obvious sense, and with Story's endorsement of the argument of Mason in the state court, it would transform the generality of towns either essentially or absolutely into private corporations. Not a few towns were chartered, under seal, upon a consideration, in the nature of a periodic rent to the throne, with an absolute grant of all the lands in the town to the persons therein named, who were endowed with "perpetual succession," with a variety of interests reserved either to the throne or for the benefit of private individuals.

Coke, in the case of Sutton's Hospital, says: "As to the seventh objection, it is to be known that in law there are two manner of foundations: one, *fundatio incipiens*; the other, *fundatio perficiens*; and, therefore, *quatenus ad capacitatem et habilitatem*, the incorporation is, *metaphorice*, called the foundation, for that is the beginning as a foundation, *quasi fundamentum capacitatis*, preceding the whole." * * * "*Sed quatenus ad dotationem, the first gift of the revenues, is called the foundation, and he who gives it is the founder in law for propria fundatio est quasi fundatio*; 2nd, the first gift is *fundamentum dotationis seu collationis, et appellatione fundi ædificium et ager continentur*; and that is proved by the statute of West, 2. c. 41." * * * "And in the report I have omitted all the arguments which were made at large upon both sides upon one common ground, where one act shall at one instant enure to divers intents distinct in time, some holding that the bargain and sale amounts not only to a dotation, but also to a foundation, and other *totis viribus e contra*; for it appears to you now, without question, that the first dotation is the foundation." If Coke and Baron Wood were right, the first donation, no matter how inconsiderable, was the foundation.

Massachusetts gave the first lands to Bowdoin, and was, therefore, the founder. If the assumptions of the court to which we have already referred were warranted, the king first

gave Landaff to Dartmouth, and was, in consequence, its founder. If a subsequent gift by the king could neither change the original foundation nor the nature of the corporation from private to public, or public to private, it is difficult to understand how like acts by private individuals could have precisely the opposite effect. It is true that the grant of Landaff was overturned, as were many other grants, by the same authority after the Revolution; but that would seem to be immaterial. If the least private interest transforms what would otherwise be a public into a private corporation, it would be a work of great difficulty to discover a public corporation in some of the states. The Federal Supreme Court and Story assume that a stream of decisions flowing from the sources of the common law have divided all corporations into two classes, *public* and *private*. This distinction has probably become too firmly imbedded in the body of American law to be eradicated; but on great questions which affect the vital interests of the nation, we must, after a time, recur to first principles, or grope blindly after justice through a bewildering labyrinth of contradictions and absurdities.

Few judges equalled Story, either in industry or research. Through his whole life he jotted down every authority which he found, sustaining any opinion he had advanced, and no judge was as fond of parading his learning as he. The only authority relied upon by him in the college cause was Dr. Bury's case, decided in 1694. When he came to decide *Allen v. McKeen*, in 1833, after fourteen years more of research and investigation, he was only able to give the additional authority of his own opinion in the college case. It is safe to say that if any others could have been found, they would not have escaped him.

The contrast between the opinions of Washington and Story upon this point is, as we have seen, very marked. Washington simply assumes that Dr. Bury's case contains all the "doctrine" on the subject, and that no case has been found in conflict with it.

That was the famous case of Exeter College. Dr. Bury was rector in 1689. On October 16, 1689, he deprived John

Colmer, one of the Fellows, for incontinency. Colmer appealed to the Bishop of Exeter, visitor of the college. The bishop, having heard the appeal, sent his chancellor, in March, 1690, to the college to restore him; but Bury and the seven senior Fellows refused to give him admittance. On July 26, 1690, after a variety of proceedings, the bishop deprived Dr. Bury for contumacy, and put John Painter in his place as rector, who demised to the plaintiff, whereupon the plaintiff entered and brought suit against the defendant. Justices William Gregory, Giles Eyre, and Samuel Eyre held that judgment should be given for the defendant, but Holt, C. J., held otherwise. Holt held that the court had no jurisdiction; the others, that it had. Holt's opinion, taken from his own manuscript, covers nearly thirteen pages, (2 Term, 346-358,) and discusses a variety of questions. He held, first, that, by the particular constitution of this college, the Bishop of Exeter had power, in this case, to give sentence; and, second, that, having that power, the justice of that sentence is not to be examined in a court of law upon an action. In the course of this discussion he says: "And that we may the better apprehend the nature of a visitor, we are to consider that there are in law two sorts of corporations aggregate—such as are for public government, and such as are for private charity. Those that are for the public government of a town, city, mystery, or the like, being for public advantage, are to be governed according to the laws of the land; if they make any particular private laws and constitutions, the validity and justice of them is examinable in the king's courts. Of these there are no particular private founders, and consequently no particular visitor; there are no patrons of these. Therefore, if no provision be in the charter how the succession shall continue, the law supplieth the defect of that constitution, and saith it shall be by election—as mayor, aldermen, common council, and the like." * * * *

"But private and particular corporations for charity, founded and endowed by private persons, are subject to the private government of those who erect them; and, therefore, if there be no visitor appointed by the founder, the law appoints the

founder and his heirs to be visitors, who are to proceed and act according to the particular laws and constitutions assigned them by the founder."

The question before the court upon this branch of the case was, as stated by Lord Holt himself, not whether corporations were public or private, but whether the constitution, the statutes of this particular college, excluded the jurisdiction of the courts of common law. He held that they did. It is obvious that what we have quoted from him was not only a *dictum*, but loosely worded, and obscure in meaning at that. If taken as it reads, all banks and the great trading and industrial corporations are neither public nor private.

The House of Lords, after an argument by Bishop Stillingfleet, reversed the judgment of the three judges, holding that the courts of common law had no jurisdiction. We are not aware of any evidence that that body affirmed the *dictum* of Lord Holt. Bishop Stillingfleet based his argument mainly upon the ground of policy. He urged that the "statutes" of the particular college must govern; that it had always been the intention of the founders to exclude the jurisdiction of the courts, and that this policy must be upheld in order to stop law-suits; that if it were otherwise, and "any encouragement were given to suits at law, those places would in time become nuisances for attorneys and solicitors."

Notwithstanding the *dictum* of Story that the *dictum* of Holt ties the hands of the "government," it is apparent, as we have already seen, that this must refer alone to the throne, for it could not tie the hands of Parliament. Generations to come may well marvel when they realize that this obscure and contradictory *dictum* of a single judge has been injected into the Federal constitution, by construction, and that our whole system of government, and the vast and varied interests of our people, must be regulated in accordance with it. They might as well have expected that the mist would mould the granite.

The great case of Charles River Bridge v. Warren Bridge was formally decided February 14, 1837. This was virtually another college case. In 1650 Massachusetts granted to

Harvard the power to dispose of a ferry between Boston and Charlestown, over Charles River, and the college held this ferry under this grant till 1785, when certain persons were incorporated as the proprietors of the Charles River Bridge, authorized to erect a bridge where the ferry was, and to take tolls for forty years, and were to pay Harvard £200 annually for thus destroying the ferry. In 1792 the charter was extended thirty years. In 1828 Massachusetts incorporated the proprietors of the Warren Bridge, with power to erect another bridge over the same river. The two bridges were sixteen rods apart on the Charlestown side, and fifty rods on the Boston side. The charter of the Warren Bridge was to expire in six years, and then be free to all.

The effect of the second grant was, as was obvious to the mind of every intelligent man, for the six years to most materially impair the value of, and thereafter to render the prior grant essentially worthless. The Charles River Bridge filed a bill in equity against the Warren Bridge at the March term of the Supreme Court of Massachusetts, 1828, praying for a temporary injunction to restrain the defendants from building a bridge under the charter, and also from suffering passengers to go over it. The court (6 Pick. 376-407) unanimously denied the motion. In 7 Pick. 344-532, the court were equally divided upon the main question. The bill was therefore dismissed, and the case went up on error from the March term, 1829, to the Federal Supreme Court. The great question, of course, was whether the second grant was prohibited by the obligation clause. It was heard before Marshall, and afterwards before Taney. The last argument was made in January, 1837. Story prepared his opinion more than five years before the decision. In his letter to Mason of November 19, 1831, he says: "I am now engaged on the Charles River Bridge Case. After it is finished I should be glad to have you read it over, if I thought it might not give you too much trouble. It is so important a constitutional question, that I am anxious that some other mind should see, what the writer rarely can in his zeal, whether there is any weak point which can be fortified, or ought to be abandoned. The

general structure of the argument, I hope, is sound; but all the details may not be." Mason, in his reply of November 24, 1831, says: "I will most willingly examine your opinion on the case you mention, and give you the result of my reflections on it." In his letter of December 23, 1831, to Mason, Story says: "Owing to my recent illness, from which I am now, I trust, entirely recovered, the preparation of my opinion in the Charles River Bridge Case was suspended. I have just completed it; and it is to be copied, and I hope to send it to you by the middle of the next week. If you should have examined it sufficiently to give your opinion, I should be glad to receive it before I go to Washington, which will be by Sunday, the 2d of January. If not, I will thank you to send it to me by mail at Washington. I wish to make some remarks to explain its great length and the repetition of the same suggestions in different parts of the same opinion. I have written my opinion *in the hope of meeting the doubts of some of the brethren*, which are various, and apply to different aspects of the case. To accomplish my object, I felt compelled to deal with each argument separately, and answer it in every form, since the objections of one mind were different from those of another. One of the most formidable objections is the rule that royal grants, etc., are to be strictly construed; another is against implications in legislative grants; another is against monopolies; another is that franchises of this sort are bounded by local limits; another, that the construction contended for will bar all public improvements. I have been compelled, therefore, to restate the arguments in different connections. *I have done so, hoping in this way to gain allies.* I should otherwise have compressed my opinion within half the limits." Story undoubtedly spoke for himself and the dead chief justice, and his opinion was entirely consistent with those given by him in the college causes. The argument of Marshall on this point, in *Fletcher v. Peck*, as his reference to Blackstone shows, is that a grant by the state stands in the same place as an executed sale of a horse by A to B, or, if we are to believe Webster, the gift of a sum of money from C to D. The opinions in the college cases rest upon the

same foundation. But the majority of the judges in the Bridge case evade this underlying principle by a flank movement. They say, in effect, that though a grant by the king to A is, in a constitutional sense, as much a contract as one between B and C, that the grantee, in the first case, takes nothing by implication, while exactly the reverse is true in the second case; and that, therefore, one is, in effect, protected by the constitution, while the other is not. While we are clear that the decision in the Bridge case was right, we are equally clear that an unsound reason was given for it. Chancellor Kent, whose view in relation to this distinction was endorsed by a large majority of the great lawyers of his day, said in his letter to Story of June 23, 1837: "I abhor the doctrine that the legislature is not bound by everything that is necessarily implied in a contract, in order to give it effect and value, and by nothing that is not expressed *in hæc verba*; that one rule of interpretation is to be applied to their engagements, and another rule to the contracts of individuals."

The decision in the Bridge case was right for exactly the same reasons that the argument in *Fletcher v. Peck* and the opinions in the college cases were wrong.

[TO BE CONTINUED.]

IV. THE ENFORCEMENT OF JUDGMENTS AGAINST BANKRUPTS.

SEC. 1. Bankrupts, like other persons, are subject to the jurisdiction of the various courts.

SEC. 2. Classification of judgments against bankrupts.

SEC. 3. Judgments entered within four months prior to bankruptcy, when may be avoided as unlawful preferences.

SEC. 4. Judgments entered after filing petition in bankruptcy.

SEC. 5. Judgment and execution liens not extinguished by bankruptcy.

SEC. 6. Enforcing judgment and other liens in court of bankruptcy.

SEC. 7. Cases where the creditor may proceed in the state court after presenting his judgment as a claim against the bankrupt.

SEC. 8. Enforcing judgments never presented to the court of bankruptcy.

SEC. 9. Enjoining proceedings in the state courts.

SECTION 1. *Bankrupts are, like other Persons, subject to the Jurisdiction of the Courts.*—The term bankrupt will, in this article, be employed to denote a person who has, either upon his own petition, or that of one or more of his creditors, been “adjudged a bankrupt,” in proceedings authorized by the present statutes of the United States. Before proceeding to consider the effect of any particular class of judgments, or the means by which the holders thereof may make such judgments productive, we shall first enquire whether there are any judgments which may be regarded as having no validity against the bankrupt. The answer to this question must be, that a bankrupt, like most other persons, is subject to the jurisdiction of the different courts, state and national. When summoned to appear before one of these courts, he must not treat its process with contempt, nor assume that it will take judicial knowledge of those circumstances, which, if properly pleaded, would cause the court either to suspend its proceeding or to grant judgment in his favor. In other words, whether an action be pending against

a bankrupt prior to the commencement of the proceedings in bankruptcy, or commenced during the pendency of those proceedings, or subsequent to his final discharge, he must, in either case, exercise a proper degree of vigilance in preventing the entry of a judgment in conflict with his rights; for, if such judgment be entered, he will not be permitted to treat it as void.

SEC. 2. *Classification of Judgments against Bankrupts.*—Judgments capable of enforcement against the bankrupt and his estate will, for the sake of convenience, be classified as follows: *first*, judgments entered so long anterior to the institution of the proceedings in bankruptcy that they cannot be assailed on the ground that they were given with a view of permitting the plaintiff to obtain a preference over the other creditors of the bankrupt; *second*, judgments entered before the institution of the proceedings, but at so recent a date as to be liable to assault and overthrow, if inflicted by such a preference; and, *third*, judgments entered after the commencement of the bankruptcy proceedings. The judgments of the first class do not require any special consideration. Their validity must be conceded in the courts of bankruptcy. They cannot, in those courts, be impeached for error or irregularity, nor otherwise subjected to any collateral attack.¹

SEC. 3. *Judgments Entered within Four Months prior to the Bankruptcy.*—Judgments of the second class, when attempted to be asserted as the basis of a lien against the estate of the bankrupt, are likely to be attacked on the ground that, for the purpose of creating such liens, they are void by the provisions of sections 5021 and 5128 of the Revised Statutes.² Section 5128 provides that “if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to

¹ McKinsey v. Harding, 4 B. R. 39; *In re* J. H. Dunn, 11 B. R. 270; *In re* Diblee, 2 B. R. 617; 3 Ben. 283; Flanagan v. Pearson, 14 B. R. 37; *In re* Campbell, 1 B. R. 165; 1 Abb. C. C. 185; 1 L. T. B. 30; *In re* Burns, 1 B. R. 174; 7 A. L. Reg. (N. S.) 105; 24 Leg. Int. 357.

² These are sections 35 and 39 of the original Bankrupt Act.

give preference to any creditor or person having a claim against him, or who is under any liability for him, procures or suffers any part of his property to be attached, sequestered or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance, of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and knowing that such attachment, sequestration, seizure, payment, pledge, assignment, or conveyance, is made in fraud of the provisions of this title, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited." By section 5130 *a*, "in cases of involuntary or compulsory bankruptcy, the period of four months, mentioned in section 5128, is changed to two months." The judgments most frequently subjected to the scrutiny authorized by these sections are those rendered by confession, or upon default. When a confession of judgment, or a warrant, or other power to confess a judgment, is given more than four months prior to the filing of the bankrupt's petition, and a judgment is in fact entered by virtue thereof within the four months, the question then arises whether the validity of the judgment depends on the date of its entry, or the date of the warrant or power. The answer to this question was given by the Supreme Court of the United States: "In a case where a creditor, holding a confession of judgment perfectly valid when it was given, causes the judgment to be entered of record, how can it be said the debtor procures the entry at the time it is made? It is true the judgment is entered in virtue of his authority, an authority given when the confession was signed. That may have been years before; or, if not, it may have been when the debtor was perfectly solvent. But no consent is given when the entry is made, where the confession becomes an actual judgment, and when the preference, if it be a preference, is obtained. The debtor has

nothing to do with the entry. As to that, he is entirely passive. Ordinarily, he knows nothing of it, and he could not prevent it if he would. It is impossible, therefore, to maintain that such a judgment is obtained *when* his confession is placed on record.³ It follows, therefore, that if the authority to confess the judgment was given more than four months before the filing of the petition, the judgment cannot be avoided merely because it was entered within that time.⁴ A confession of judgment, or a warrant to confess judgment, given to secure a loan then made,⁵ or given by an insolvent to secure a pre-existing debt, to a person who did not have reasonable cause to believe the debtor insolvent, is not an unlawful preference, and a judgment thereon is not void under the provisions of sections 5021 or 5128 of the Revised Statutes.⁶ To avoid any seizure or judgment by the aid of these sections, it is evident that these five circumstances must be established: 1st, that the debtor was insolvent, or contemplating insolvency; 2d, that while so, he procured or suffered the seizure or judgment; 3d, that the procuring or suffering was within the time specified by the act; 4th, that it was with the view of giving a preference; and, 5th, that the person benefited had reasonable cause to believe the debtor insolvent, and that the latter was acting in fraud of the Act.⁷ When a creditor, knowing his debtor to be insolvent, pursues the latter by the ordinary remedy for the collection of his debt, and the latter, also knowing his own insolvency, makes no defence, and permits judgment to be entered against himself by default, within four months before the

³ Clark v. Iselin, 7 C. L. N. 185; 2 C. L. J. 210; 11 B. R. 337; reversing, 10 Blatch. 204.

⁴ Clark v. Iselin, cited above; Piper v. Baldy, 10 B. R. 517; 31 Leg. Int. 310; Field v. Baker, 11 B. R. 415; Sleek v. Turner, 10 B. R. 580; 1 A. L. T. 485; 31 Leg. Int. 308; *Contra* Zahm v. Fry, 9 B. R. 546; 31 Leg. Int. 197; Hood v. Karper, 5 B. R. 358; 28 Leg. Int. 340; Golson v. Neihoff, 5 B. R. 56; 2 Biss. 434; *In re* Terry, 2 Biss. 356.

⁵ Clark v. Iselin, cited above.

⁶ Mays v. Fritton, 20 Wall. 414; 11 B. R. 229.

⁷ Clark v. Iselin, 7 C. L. N. 185; 2 C. L. J. 210; 11 B. R. 337; Hoover v. Greenbaum, 61 N. Y. 305.

commencement of proceedings in bankruptcy, all these five circumstances seem almost necessarily to co-exist. The only ones which can be absent in such a case are, the view on the part of the debtor of giving a preference, and the creditor's knowledge that the debtor is suffering judgment to be entered in fraud of the provisions of the Act. But, as the debtor is presumed to intend the necessary consequence of his own act, and as, in such a case, his inaction so uniformly leads to the obtaining of a preference in favor of the creditor, and thereby accomplishes the result which the Bankrupt Act was intended to avoid, it was, for a considerable time, almost conceded that a judgment so permitted was necessarily "suffered" "with a view to give a preference," and that the creditor knew it was so suffered; and that he could, therefore, derive no benefit from it out of the bankrupt's estate.⁸ Different views finally prevailed in the Supreme Court of the United States. It was there maintained that to render a judgment obnoxious to the Bankrupt Act there must exist in the mind of the debtor a positive purpose or intent to defeat or delay the operation of the Act, or to accomplish something which the Act treated as unlawful; or that it would be immoral for him to oppose or impede his creditor by false or dilatory pleas; that he was under no moral or legal obligation to file his petition in bankruptcy; and, as the result of these propositions, that the debtor could not be presumed to have been actuated by an unlawful purpose, from the fact that he neither perpetrated the wrong of defending against a just claim, nor made an application to the courts of bankruptcy when he was under no obligation to make such application.⁹ In such cases the *intent* of the debtor is the turning-point, and what this intent

⁸ Warren v. D. C. & W. R. W. Co., 7 B. R. 451; 5 C. L. N. 205; *In re McGhie*, 2 Biss. 163; *In re Heller*, 3 Biss. 153; Wilson v. Brinkman, 2 B. R. 149; Buchanan v. Smith, 16 Wall. 277; 5 C. L. N. 277.

⁹ Wilson v. City Bank, 17 Wall. 489; 6 C. L. N. 149; 9 F. R. 97; Britton v. Payen, 9 B. R. 445; Partridge v. Dearborn, 9 B. R. 474; Henkelman v. Smith, 12 B. R. 121; 42 Md. 164; Loucheim v. Henszey, 77 Tenn. St. 305.

was must be determined from the consideration of all the attending circumstances.¹⁰ While an unlawful intent is not to be inferred from mere "passive non-resistance to regular judicial proceedings," "undoubtedly very slight evidence of an affirmative character of the existence of a desire to prefer one creditor, or of acts done with a view to secure such preference, might be sufficient to invalidate the whole transaction. Such evidence might be sufficient to leave the matter to a jury, or to support a decree, because the known existence of a motive to prefer or to defraud the Bankrupt Act would color acts or decisions otherwise of no significance."¹¹ When a judgment is sought to be employed to secure a preference forbidden by the Bankrupt Act, the usual and most convenient method of thwarting this purpose, and of litigating the issues necessarily involved, is by filing a bill in equity on behalf of the assignee.¹²

SEC. 4. *Judgments Entered after the Filing of the Petition in Bankruptcy.*—In considering judgments of the third class—namely, those entered *after* the filing of the petition in bankruptcy—we are tempted to treat of the cases in which courts may properly proceed to judgment against a bankrupt, where the fact of the bankruptcy is regularly presented to their attention. Want of space compels us to resist this temptation. It is sufficient for our present purpose to say that the rendition of a judgment against a person who, at the time, is a bankrupt, or against his assignee, implies either that the defendants waived their rights, or else that the court determined that the case was one in which it was proper to give the judgment entered. The judgment, if erroneous or irregular, should be corrected by appeal or by some appropriate proceeding in the tribunal where it was entered. Even where the suit is instituted in a state court subsequent to the adju-

¹⁰ Little v. Alexander, 21 Wall. 500; 7 C. L. N. 339; 12 B. R. 134.

¹¹ Wilson v. City Bank, 17 Wall. 489; Beattie v. Gardner, 4 B. R. 323; 4 Ben. 479; see also, 3 C. L. J. 651, referring to Ripley v. Sears, decided by Judge Dillon.

¹² Kellogg v. Russell, 11 B. R. 121; Warren v. Tenth N. B., 7 B. R. 481; 10 Blatchf. 493.

dication of bankruptcy, the judgment in such suit is not on that account void, but is binding upon all the defendants upon whom the summons to appear was served in the manner prescribed by law,¹³ until they shall cause it to be vacated or reversed. Nor can a bankrupt who permits a judgment to be entered against him by default obtain an injunction to prevent its enforcement against him personally.¹⁴ If an action is pending in a state court prior to the filing of the bankrupt's petition, it will properly proceed to judgment unless the bankrupt, or his assignee, discloses to the court the existence of the adjudication of bankruptcy.¹⁵ Even where an attachment on *mesne* process has been levied within four months prior to the filing of the petition, and is therefore dissolved by the provisions of section 5044, the assignee is not warranted in treating the court issuing, nor the officer serving, the attachment with contempt. He is not to seize the property and by force wrest it from the possession of the officer of the state tribunal. He must go into that tribunal, allege and establish the adjudication of bankruptcy and the assignment made in pursuance thereof, and ask that the attachment be dissolved and that the officer be required to surrender possession of the property.¹⁶ If the attachment was levied more than four months prior to the filing of the petition, the court issuing the writ may, after the adjudication of bankruptcy, enter a judgment authorizing the sale of the property as levied upon; and a sale in pursuance of such judgment will relate back to the levy, and transfer title free of the claims of the bankrupt's assignee.¹⁷

¹³ *In re Davis*, 8 B. R. 167; 1 Saw. C. C. 260; *In the Matter of Sacchi*, 43 How. P. 250; *Bradford v. Rice*, 102 Mass. 472; *McKay v. Funk*, 13 B. R. 334; *Brown v. Gibbons*, 13 B. R. 407.

¹⁴ *In re Tooker*, 14 B. R. 35.

¹⁵ *Dunbar v. Baker*, 104 Mass. 211; *Doe v. Childress*, 21 Wall. 643; 7 C. L. N. 201; *Palmer v. Merrill*, 57 Me. 26; *Hewett v. Norton*, 13 B. R. 276; *Valliant v. Childress*, 11 B. R. 317; *Flanagan v. Pearson*, 14 B. R. 37; *Lenihan v. Haman*, 6 C. L. N. 63; 55 N. Y. 652; 8 B. R. 557; *Eyster v. Gaff*, 13 B. R. 546; 8 C. L. N. 177; 1 Otto, 521.

¹⁶ *Kent v. Downing*, 44 Geo. 116; *Johnson v. Bishop*, 1 Woolw. 324; 8 B. R. 533.

¹⁷ *Doe v. Childress*, 21 Wall. 643; 7 C. L. N. 201; *Valliant v. Child-*

SEC. 5. *Judgment and Execution Liens are not extinguished by Bankruptcy.*—When a judgment is in existence against a bankrupt, the judgment creditor will seek to make it productive by proceeding either in the court of bankruptcy or in the court where it was rendered; or it may happen that circumstances will arise making it proper to proceed in both courts. If the judgment is not a lien on the bankrupt's estate, or has not been followed by an execution or levy constituting a lien, it is no more than a simple unpreferred claim, and must be presented and its allowance procured in the same manner as other unsecured claims. It is only when a judgment is a lien, or the foundation upon which a lien rests, that its assertion is likely to call for special attention or to occasion special resistance in the bankruptcy court. Let us now enquire when a judgment must be treated as a valid lien, or as the foundation of a valid lien, against the estate of the bankrupt. All liens are preserved in bankruptcy,¹⁸ except those based on attachments on *mesne* process levied within four months before the filing of the petition, and those which can be avoided by showing that they were procured or preferred with a view of giving the preference prohibited by sections 5021 and 5128, to which reference has already been made. But no valid lien against the estate of a bankrupt can be created after such estate has, in contemplation of law, vested in his assignee. And the title of the assignee, by virtue of the provisions of section 5044, relates "back to the

ress, 11 B. R. 317; Batchelder v. Putnam, 13 B. R. 404; Munson v. B. H. & E. R. R. Co., 14 B. R. 173; Stoddard v. Locke, 43 Vt. 574; 9 B. R. 71; Daggett v. Cook, 37 Conn. 341; Bates v. Tappan, 99 Mass. 376; 3 B. R. 647; Leighton v. Kelsey, 57 Me. 85; 4 B. R. 471; Bowman v. Harding, 56 Me. 559; 4 B. R. 20; May v. Courtney, 47 Ala. 185; Johnson v. Collins, 116 Mass. 392; Rowe v. Page, 13 B. R. 366; 54 N. H. 190.

¹⁸ *In re* Hambright, 2 B. R. 498; 2 L. T. B. 61; 1 C. L. N. 201; Austin v. O'Reilly, 2 C. L. J. 455; House v. Swanson, 7 Heisk. 32; Haughton v. Eustis, 5 Law Rep. 505; *In re* Angier, 4 B. R. 619; 10 A. L. Reg. (N. S.) 190; 1 L. T. B. 48; *In re* Hester, 5 B. R. 285; *In re* N. Y. M. S. Co., 2 B. R. 74; *In re* W. H. Wiley, 4 Biss. 171; *In re* Perdue, 2 B. R. 183; 2 West. Jur. 279; The Ironsides, 4 Biss. 518; Parker v. Muggridge, 2 Story, 334; Fletcher v. Morey, 2 Story, 555; *In re* Wynne, 4 B. R. 23; 2 L. T. B. 116; 9 A. L. Reg. (N. S.) 627.

commencement of the proceedings in bankruptcy. Every judgment¹⁹ or execution²⁰ lien, or lien created by the levy of an execution,²¹ which, anterior to the commencement of the proceedings in bankruptcy, was a lien against the estate of the bankrupt, continues in force against such estate in the hands of the assignee, unless he can show that it was procured or suffered to give a preference forbidden by the Bankrupt Act.

SEC. 6. *Enforcing Judgment and other Liens in Courts of Bankruptcy.*—When a judgment creditor has either of the liens specified in the preceding section of this article, and desires to obtain the benefit thereof by the aid of the court of bankruptcy, he should first prove his claim as a secured creditor.²² He may then, by section 5075, be admitted as a creditor for the balance of the debt after deducting the value of the property subject to his lien, to be ascertained by agreement between him and the assignee, or by a sale thereof; or he may release his claim to the assignee and prove his whole debt; or he may purchase the assignee's right of redemption; or he may apply, at any time after the appointment of the assignee, to the court to have the property sold

¹⁹ *Meeks v. Whatley*, 10 B. R. 501; *Phillips v. Bowdoin*, 14 B. R. 43; *Winship v. Phillips*, 14 B. R. 50; *In re Smith and Smith*, 1 B. R. 599; 2 Ben. 122; 1 L. T. B. 112; *Catlin v. Hoffman*, 9 B. R. 342; 2 Saw. C. C. 486; *Witt v. Haeth*, 8 C. L. N. 40; 13 B. R. 106; *Webster v. Woolbridge*, 3 Dill. 74; *In re Cook*, 2 Story C. C. 376; *Partridge v. Dearborn*, 9 B. R. 474; *Haworth v. Travis*, 13 B. R. 145; *Livingston v. Livingston*, 2 Cai. Cas. 300; *In re John McGilton*, 7 B. R. 294. But if the judgment is not, at the commencement of the bankruptcy proceedings, a perfect and valid lien by the laws of the state, it is, of course, no lien against the estate of the bankrupt. *In re McIntosh*, 2 B. R. 506; *In re Mebane*, 3 B. R. 347; *In re Cozart*, 3 B. R. 508.

²⁰ *In re Weeks*, 4 B. R. 364; 2 Biss. 259; *Wilson v. Childs*, 6 C. L. N. 27; *Horter v. Harlan*, 5 C. L. N. 374; *Witt v. Aughinbaugh*, 8 C. L. N. 41; *Contra*, *In re Tills & May*, 11 B. R. 214.

²¹ *In re Kerr*, 2 B. R. 388; 2 L. T. B. 39; *Swope v. Arnold*, 5 B. R. 148; *In re Hughes*, 7 C. L. N. 162; *In re Bernstein*, 1 B. R. 199; 2 Ben. 44; 34 How. Pr. 289; *Haughey v. Albin*, 2 B. R. 399; 2 Bond, 224; 2 L. T. B. 47; *Beers v. Place*, 4 B. R. 150; *Armstrong v. Rickey*, 4 B. R. 473; 1 C. L. N. 145.

²² *In re Bigelow*, 1 B. R. 632; 2 Ben. 480; 1 L. T. B. 95.

and the proceeds applied to the satisfaction of his claim.²³ The assignee may apply to the court and procure an order authorizing him to sell the property, either subject to or free from the lien.²⁴ In case the assignee wishes to sell free of all liens, he should give the lien-holders notice of his intention to apply to the court for authority so to do.²⁵ The funds realized from a sale made free of liens must be treated as subject to the same liens from which the property was freed for the purpose of being sold. Property sold by the assignee will be subject to all liens from which it does not clearly appear to have been freed by the order of the court.²⁶

SEC. 7. *Cases where Creditor may Proceed in State Court after Presenting his Judgment as a Claim against the Bankrupt.*—The only provision of the statute in express terms forbidding the execution of judgments pending proceedings in bankruptcy is to be found in section 5105. By that section, "no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him, and all proceedings already commenced or unsatisfied judgments already obtained thereon against the bankrupt shall be deemed to be discharged and surrendered thereby." While a portion of this section seems, when considered by itself, to discharge, unconditionally, those judgments which are proved as claims against the estate of the bankrupt, yet it is evident from the whole section, and from the general purpose and result of the proceedings in bankruptcy, that a judgment is not, by being proved against the bankrupt, so extinguished that it cannot under any circumstances thereafter be enforced by execution. The judgment creditor may purchase the assignee's right of redemption, or he may ask

²³ *In re Grinnell*, 9 B. R. 29; *In re T. R. Stewart*, 1 B. R. 278.

²⁴ *In re Barrow*, 1 B. R. 481; 1 L. T. B. 63; *In re McClellan*, 1 B. R. 289; *In re National Iron Co.*, 8 B. R. 422; 20 Pitts. L. J. 208; 30 Leg. Int. 272; *Sutherland v. L. S. C. Co.*, 9 B. R. 298; 1 C. L. J. 127.

²⁵ *Foster v. Ames*, 2 B. R. 455; *Lowell*, 313; *Ray v. Brigham*, 12 B. R. 145; 25 La. An. 600; *Meek v. Whatley*, 10 B. R. 498.

²⁶ *In re McGilton*, 7 B. R. 294; 3 Biss. 144; 5 C. L. N. 1.

to be admitted as a creditor for so much only of his judgment as remains unpaid after deducting the value of the property as ascertained by agreement between him and the assignee; or the property may, by order of the court of bankruptcy, be sold subject to the judgment or execution lien; or the property subject to the lien may have been sold by the bankrupt prior to the filing of his petition, or may, from some other cause, not vest in the assignee. In all these cases it is evident that the creditor must, where such a course is necessary to realize the fruits of his lien, be authorized to proceed in the state courts.²⁷

SEC. 8. *Enforcing Judgments Never Presented to the Court of Bankruptcy.*—The judgments referred to in the preceding section as being discharged or surrendered, embrace those only which have been proved against the bankrupt, or which are based upon claims which have been so proved. Judgments in actions for the recovery of specific property, real or personal, instituted prior to the filing of the petition, may be enforced by the form of execution appropriate to confer the relief granted thereby. The assignee is bound by the doctrine of *lis pendens* to the same extent as any other person acquiring title *pendente lite*.²⁸ Or, in other words, he acquires the estate of the bankrupt, subject to pending suits affecting the title thereto. We come now to a more difficult question, that of the rights of a judgment creditor who does not choose to present his claim against the estate of the bankrupt, preferring rather to seek its enforcement in the state courts. If such creditor had no valid lien against such estate when the petition was filed, then it is clear that he has no temptation to proceed in the state courts, for he cannot there create any lien or claim against the estate after the commencement of the proceedings in bankruptcy. But if he has

²⁷ Phillips v. Bowdoin, 14 B. R. 43; Winship v. Phillips, 14 B. R. 51; Jones v. Lellyett, 39 Geo. 64; Douglas v. St. L. Z. Co., 56 Mo. 388; King v. Bowman, 24 La. An. 506; Cumming v. Clegg, 14 B. R. 49; Leibel v. Simeon, 62 Mo. 255.

²⁸ Baum v. Stern, 1 Rich. (N. S.) 415; Eyster v. Gaff, 13 B. R. 546; 8 C. L. N. 177; 1 Otto, 521.

a lien, valid in both the national and state courts, he may desire to enforce it in the latter rather than in the former. May this desire be gratified? and, if so, when and how? Many cases may be found in which the general assertion is made that all liens against the estate of bankrupts must be enforced in the courts of bankruptcy.²⁹ There is certainly nothing in the statute which directly points to this result. The statute nowhere declares that the adjudication of bankruptcy shall, of itself, operate as a prohibition against the assertion of pre-existing liens in the state courts. When the courts of bankruptcy assumed that the mere adjudication of bankruptcy brought the bankrupt and all his assets so exclusively within their jurisdiction that no one could lawfully, even in the absence of any special inhibition, pursue his legal remedies elsewhere, they arrogated an authority which was founded rather upon their notions of what the Bankrupt Act ought to have done, than upon what it professed to do. The Supreme Court of the United States has, however, on each recurring opportunity, curbed the unsupported pretensions of the subordinate tribunals. It has insisted upon that interpretation which, without sacrificing the objects of the statute, would concede due respect both to the state and the national authorities, and would avoid needless collision between them. These principles have long been established, "that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court;"³⁰ and that where property has been taken into the possession of the officers of a court, it does not allow such possession "to be disturbed by a party, whether claiming by title paramount or under the right which

²⁹ *Blum v. Ellis*, 73 N. C. 293; 13 B. R. 345; 8 C. L. N. 162; *Taylor v. Bonnett*, 38 Tex. 521; *In re Bridgeman*, 2 B. R. 312; *In re Bigelow*, 1 B. R. 632; *In re Buehle*, 2 B. R. 577; *In re Frizelle*, 5 B. R. 122; *Stuart v. Hines*, 6 B. R. 416; *In re Hufnagel*, 12 B. R. 556; *In re Whipple*, 13 B. R. 373; *In re Brinkman*, 7 B. R. 421; *Davis v. Anderson*, 6 B. R. 145.

³⁰ *Peck v. Jennes*, 7 How. U. S. 625; *Payne v. Drew*, 4 East, 523; *Taylor v. Carryl*, 20 How. U. S. 583.

they were appointed to protect, as their possession is the possession of the court.”³¹ By the proper application of these two principles, most of the questions of conflict between the state and national authorities concerning proceedings against the estates of bankrupts may be correctly determined. If an action to enforce a lien against specific property is pending in a state court when the petition in bankruptcy is filed, such court is not thereby divested of its jurisdiction over the action. In such a case, if the plaintiff proves his claim against the bankrupt, “the proceedings already commenced” thereon are by sec. 5105 “deemed to be discharged.” If, on the other hand, the plaintiff does not prove his debt in bankruptcy, the suit may be stayed until the question of the defendant’s discharge is determined, provided there is no unreasonable delay in endeavoring to procure it.³² The assignee may also be admitted to defend the suit. But the state court cannot be divested, through the action of the bankruptcy courts, of its ultimate right to determine that suit, and all the issues therein which it would have been competent to determine if no petition in bankruptcy had been filed.³³ Hence, if an action to foreclose a lien and obtain the sale of property is pending when the proceedings in bankruptcy are commenced, it may lawfully continue to judgment; and a sale under such judgment will vest a title in the purchaser, taking effect by relation at the inception of the lien, and thereby divesting the title of the assignee. This result will be accomplished whether the assignee was made a party to the proceeding or not. He shares the same fate as any other person acquiring an interest *pendente lite*.³⁴ If the state court has possession of property, either by its receiver,³⁵ or by a sheriff under the levy of a valid execu

³¹ Taylor v. Carryl, 20 How. U. S. 594; Noe v. Gibson, 7 Paige, 513.

³² See Sec. 5106.

³³ Samson v. Burton, 4 B. R. 1; 5 Ben. 325; Stone v. B. N. Bank, 39 Ind. 284; *In re Clarke*, 3 B. R. 491; 4 Ben. 88; Clark v. Binninger, 5 B. R. 255; 39 How. P. 363; *In re Wynne*, 4 B. R. 23; 2 L. T. B. 116; 9 A. L. Beg. (N. S.) 627.

³⁴ Eyster v. Gaff, 13 B. R. 546; 8 C. L. N. 177; 1 Otto, 521.

³⁵ Davis v. R. R. Co., 13 B. R. 258; Myer v. C. L. & P. W., 14 B. R.

tion,³⁶ its possession cannot be disturbed. In the latter case the sheriff should proceed to sell the property and turn over to the creditor so much of the proceeds as is necessary to satisfy the lien of the levy.³⁷ So, if the property be in the possession of an officer of the court under an attachment on *mesne* process levied more than four months prior to the filing of the debtor's petition, the court should retain possession, enter a judgment for the sale of the property and its officer should execute such judgment.³⁸ When, however, a state court has not the possession of the estate of the bankrupt, but such estate is subject to a valid judgment or execution lien, a more difficult question arises. In such a case it is claimed, with a great deal of force, that the property, by vesting in the assignee, becomes in *custodia legis*; and, therefore, upon well settled principles, cannot be subjected to any interference not sanctioned by the court of bankruptcy.³⁹ Where the property subject to the lien is exempt from the operation of the Bankrupt Act,⁴⁰ or has been sold by the debtor before filing the petition,⁴¹ or, from any other cause, does not vest in the assignee, the claim that it becomes in *custodia legis* by virtue of the proceedings in bankruptcy is certainly unfounded. It may, therefore, be sold under process issued out of a state court. So, after the proceedings in bankruptcy have terminated, either by the discharge⁴² of the bankrupt

9; Sedgwick v. Menck, 1 B. R. 675; 6 Blatchf. 156; Appleton & Bowles, 9 B. R. 354; 2 N. Y. Supr. Ct. 568; 6 C. L. N. 192; *In re Clark & Binninger*, 3 B. R. 491; 4 Ben. 88; *Contra*, *In re Whipple*, 6 Biss. 516; 13 B. R. 373.

³⁶ Marshall v. Knox, 8 B. R. 97; 16 Wall. 551; *In re Smith & Smith*, 1 B. R. 599; Wilson v. Childs, 6 C. L. N. 27; *In re W. H. Shuey*, 6 C. L. N. 248; *In re Weamer*, 8 B. R. 527; Allen v. Montgomery, 48 Miss. 101; Thompson v. Moses, 43 Geo. 383; O'Brien v. Weld, 2 Otto, 81.

³⁷ Sharman v. Howell, 40 Geo. 237; 2 Am. Rep. 576; Parks v. Sheldon, 36 Conn. 466; 4 Am. Rep. 95, and the authorities in the last citation.

³⁸ See citation No. 17.

³⁹ Marshon v. Haney, 12 B. R. 484; 4 B. R. 510; 1 Dill. 497; Davis v. Anderson, 6 B. R. 145; Turner v. Skylark, 6 C. L. N. 239.

⁴⁰ Cummings v. Clegg, 14 B. R. 49; Robinson v. Wilson, 15 Kans. 595.

⁴¹ Jones v. Lellyett, 39 Geo. 64.

⁴² Cole v. Duncan, 58 Ill. 176; Reed v. Bullington, 49 Miss. 223; 11

or by the refusal of such discharge,⁴³ we do not doubt that the creditor may enforce his lien in the state court, for in either of these cases it is certain that the property, if ever in *custodia legis*, has ceased to be so. Except in the state of Louisiana, levies are made upon real estate without disturbing the possession of the defendant.⁴⁴ In fact no authority for such disturbance exists until after the sale is made, and, in most cases, not until the purchaser's title has become absolute by reason of the expiration of the statutory period allowed for redemption. The levy upon lands does not create any special property in the levying officer, as is the case when personalty is seized under execution. And we do not understand that a levy upon real estate places it in the custody of the law, in any of those states whose statutes give no authority for wresting it from the custody of the defendant. But we think it must be conceded that the levy of an execution upon real estate confers authority upon the officer to proceed, notwithstanding the subsequent bankruptcy of the defendant, to make the levy productive by a sale of the property.⁴⁵ Where, however, no levy has been made prior to the filing of the petition, quite a number of authorities may be produced to support the proposition that a subsequent sale is void, though supported by a valid execution or judgment lien.⁴⁶ Some of these authorities are founded upon the theory that the state courts have no power whatever to enforce a lien against the estate of a bankrupt; and some upon the theory that, by virtue of the bankruptcy

B. R. 408; *Truitt v. Truitt*, 38 Ind. 16; *Pierce v. Wilcox*, 40 Ind. 70; *Second N. B. v. N. S. B. of Newark*, 7 C. L. N. 70; 11 B. R. 49; 14 A. L. Reg. (N. S.) 281; *Payne v. Able*, 4 B. R. 220; 7 Bush, 344; *Wicks v. Perkins*, 13 B. R. 280; *Contra*, *Johnson v. Poag*, 39 Tex. 92; *Stemmons v. Burford*, *ib.* 352.

⁴³ *Dingee v. Becker*, 9 B. R. 508; 31 Leg. Int. 156.

⁴⁴ *Freeman on Executions*, sec. 280.

⁴⁵ *Goddard v. Weaver*, 6 B. R. 440; *Thompson v. Moses*, 43 Geo. 383; *Maris v. Durou*, 1 Brews. 428; *Norton v. Boyd*, 3 How. U. S. 426.

⁴⁶ *Davis v. Anderson*, 6 B. R. 145; *Turner v. The Skylark*, 6 C. L. N. 239; *Blum v. Ellis*, 13 B. R. 345; 8 C. L. N. 162; *Phelps v. Selleck*, 8 B. R. 390; *Stemmons v. Burford*, 39 Tex. 352.

and the assignment in pursuance thereof, the property is in custody of the law. The first theory cannot be sustained. Let us, therefore, proceed to examine the second. The title of the bankrupt is not divested by the filing of the petition, nor by the adjudication of bankruptcy.⁴⁷ The judge or register must make a written transfer to the assignee. We shall show that the court of last resort, so far as it has expressed any opinion on the subject, considers the title of the assignee to be very similar to that of a grantee under a voluntary conveyance. Thus, Mr. Justice Hunt, in delivering the opinion of the Supreme Court of the United States, in the case of *Valliant v. Childress*,⁴⁸ said: "The conveyance of the register operates as would, under ordinary circumstances, the deed of a person having the title, with two differences: first, it relates back to the commencement of the bankruptcy proceeding; secondly, the register's conveyance dissolves any attachment that has been made within four months previous to the bankruptcy proceedings." These views are substantially identical with those subsequently expressed in the same court by Mr. Justice Miller, in the case of *Eyster v. Gaff*.⁴⁹ If the differences here suggested between a register's conveyance and that of an ordinary conveyance by a person having the title are the only differences that really exist, then it follows that the grantee takes title subject to its being divested by a sale under a pre-existing judgment or execution lien against his predecessor in interest. If the lien be based on an attachment levied upon real estate over four months prior to the filing of the petition in bankruptcy, no doubt such real estate may be sold under a writ subsequently issued out of the state court.⁵⁰ We see no reason supporting such a sale which does not apply with equal force to a sale under a judgment lien. In neither case is the property in the

⁴⁷ Sec. 5044.

⁴⁸ 11 B. R. 319.

⁴⁹ 8 C. L. N. 177; 13 B. R. 546; 1 Otto, 21.

⁵⁰ *Doe v. Childress*, 7 C. L. N. 201; 21 Wal. 642; *Daggett v. Cook*, 37 Conn. 341; *Bates v. Tappan*, 99 Mass. 376; 3 B. R. 647; *Valliant v. Childress*, 11 B. R. 319; *Peck v. Jenness*, 7 How. U. S. 612.

possession of the state court. In both cases the property is subject to a lien which is not extinguished by the bankruptcy of the defendant, and which needs no further levy to make it perfect. The Supreme Court of Pennsylvania has affirmed the right of the holder of a judgment lien to sell real estate pending proceedings in bankruptcy, although no levy had been made prior to the commencement of such proceedings.⁵¹ This position is well fortified by the decisions made under the Bankrupt Act of 1841;⁵² and we judge that it will in due time be equally well sustained by the judgment of the court of last resort declaring the true meaning of the present statutes of the United States. With respect to the judgments under which execution may issue against the person of the debtor, the rule seems to be that if the defendant is under arrest when the bankruptcy proceedings are instituted, there is no means by which, pending those proceedings, he can procure his release through the operation of the Bankrupt Act, and that, on the other hand, if he is not under arrest when those proceedings are instituted, he is entitled to exemption during their pendency, except when pursued for some "debt or claim from which his discharge in bankruptcy would not release him."⁵³ It has been held, and, as we think, with great propriety, that the application for release from arrest should first be made to the court under whose writ it was made.⁵⁴ But the courts of bankruptcy are not inclined to accede to this proposition, and are in the habit of themselves adjudicating upon the lawfulness of the arrest, and granting releases where they think proper, without first compelling resort to the state courts.⁵⁵

⁵¹ *Fehley v. Barr*, 66 Penn. St. 196; *Reeser v. Johnson*, 76 Penn. St. 313; 10 B. R. 467; see also *Reed v. Bullington*, 11 B. R. 408; 49 Miss. 223.

⁵² *Savage v. Best*, 3 How. U. S. 111; *McCance v. Taylor*, 10 Gratt. 580; *Russell v. Cheatham*, 8 S. & M. 703; *Turner v. Melton*, 9 S. & M. 27.

⁵³ Sec. 5107; *In re Wiggers*, 2 Biss. 71; *In re Patterson*, 1 B. R. 307; 2 Ben. 155; *In re Niffin*, 1 Penn. L. J. 146; *Horter v. Harlan*, 7 B. R. 238; 29 Leg. Int. 229; *In re Devoe*, 2 B. R. 27; *Lowell*, 251; 1 L. T. B. 90; *Usher v. Pease*, 116 Mass. 440.

⁵⁴ *In re M. O. Mara*, 4 Biss. 506; *In re Migel*, 2 B. R. 481.

⁵⁵ *In re Williams & McPheeters*, 11 B. R. 145; 7 C. L. N. 49; *In re*

SEC. 9. *Enjoining Proceedings in State Courts.*—In what has been said in the preceding section about the right of judgment creditors to proceed in state courts, we have assumed that such right was not exercised in defiance of any direct prohibition from the courts of bankruptcy. We shall now consider the power and propriety of the last named courts enjoining proceedings in the first named. The express authority granted by the Bankrupt Act to issue injunctions is that conferred by sec. 5024 of the present Revised Statutes. That section refers to involuntary or compulsory proceedings; and provides that “the court may, by injunction, restrain the debtor, or any other person,” from making any transfer or disposition of any part of the debtor’s property. But this injunction is only to be operative from the filing of the petition until the adjudication of bankruptcy can be had.⁵⁶ At the time the Bankrupt Act was passed a statute had long been in force expressly prohibiting the national courts from restraining proceedings in the state courts.⁵⁷ This pre-existing statute, taken in connection with the significant circumstance that the Bankrupt Act, where it did mention injunctions, provided for their issuing in a specified case and then to remain in force but a limited time, fully justified, as we think, those decisions which denied the right of the courts of bankruptcy to enjoin proceedings in the state courts.⁵⁸ Section 4972,

Glaser, 1 B. R. 366; 2 Ben. 180; 1 L. T. B. 57; *In re Borst*, 2 B. R. 17; *In re Valk*, 3 B. R. 278; 3 Ben. 431; *In re Simpson*, 2 B. R. 47.

⁵⁶ *Creditors v. Cozzens*, 3 B. R. 281; 2 W. Jur. 349; 17 Pitts. L. J. 236; *Irving v. Hughes*, 2 B. R. 62; 7 A. L. Reg. (N. S.) 209; *In re Kintzing*, 3 B. R. 217; *In re Metzler*, 1 B. R. 38; 1 Ben. 356; *In re Moses*, 6 B. R. 181.

⁵⁷ Sec. 5 of Act of Congress of March 2, 1793, among other provisions, contained the following: “Nor shall a writ of injunction be granted to stay proceedings in any court of a state.” The corresponding section in the present Revised Statutes is as follows: “The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by the law relating to proceedings in bankruptcy.” R. S. of U. S. sec. 720.

⁵⁸ *In re Hugh Campbell*, 1 B. R. 165; 1 Abb. C. C. 185; 1 L. T. B. 30; 3 Pitts. L. J. 96; *In re S. M. Burns*, 1 B. R. 174; 7 A. L. Reg. (N.

among other things, confers jurisdiction upon the district courts, as courts of bankruptcy, to collect all assets of the bankrupt; to ascertain and liquidate all liens and claims thereon; to adjust the various priorities and conflicting interests of all parties; and to marshal and dispose of the different funds and assets so as to secure the rights of all parties and a due distribution of the assets. These powers are very extensive, and must, in many instances, be invoked when great promptitude of action is required. Proceedings in the state courts, if permitted to continue, would frequently so dispose of the bankrupt's assets that the courts of bankruptcy could not adequately assert the jurisdiction conferred by this section. Hence the last named courts have so frequently asserted their authority to suspend proceedings in the state courts when such suspension appeared necessary to accomplish the objects sanctioned by sec. 4972, that probably Mr. High is fully justified in his assertion that "the jurisdiction of the United States courts, sitting in bankruptcy, to restrain proceedings in the state courts against the estate of a bankrupt, though sometimes questioned, may be regarded as too clearly settled to admit of doubt."⁵⁹ While conceding the decisive preponderance of the authorities, we are by no means convinced of their soundness, and, whether sound or not, we feel assured that the power which they affirm ought to be sparingly exercised.⁶⁰ In the first place, we question

S.) 105; 24 Leg. Int. 357; 3 Pitts. L. J. 107; Tenth N. B. 42; 42 How. P. 179.

⁵⁹ High on Injunctions, §. 208; *In re* Mallory, 6 B. R. 22; 1 Saw. 88; *Jones v. Leach*, 1 B. R. 595; *In re* Barrow, 1 B. R. 481; *Lady Bryan M. Co.*, 6 B. R. 252; *Kerosene Oil Co.*, 3 B. R. 125; 3 Ben. 35; 6 Blatchf. 521; *In re* Snedaker, 3 B. R. 629; *Markson v. Heaney*, 4 B. R. 510; 1 Dill. 497; *Whitman v. Butler*, 8 B. R. 487; *Pennington v. Sale*, 1 B. R. 572; *Hyde v. Bancroft*, 8 B. R. 24; 6 Ben. 392; *Irving v. Hughes*, 2 B. R. 62; 7 A. L. Reg. (N. S.) 209; *In re* Wallace, Deady, 433; 2 B. R. 52; *Iron M. Co.*, 9 Blatchf. 320; *In re* Atkinson, 7 B. R. 144; 5 Am. L. T. 320; 3 Pitts. L. J. 423; *In re* Shuey, 6 C. L. N. 248.

⁶⁰ Our opinion that injunctions to restrain proceedings in state courts ought not to be needlessly granted, and, when granted, ought not to extend any farther than is essential to the protection of the interests of the general creditors, is sustained by the authorities. *In re* Davis, 8 B. R.

the existence of that imperative necessity upon which the issuing of injunctions to restrain proceedings in the state courts has been maintained. It by no means follows, because very extensive powers are granted to the bankruptcy courts in regard to marshalling assets, adjusting priorities and liquidating liens and claims, that those powers must be supported by the further power to issue injunctions. On the contrary it ought to be assumed that the state courts would act in full accord with the national courts, and would yield a voluntary submission to the authority of the latter. The statutes of the United States in regard to bankruptcy are addressed to the state, as well as to the national, courts, and must, of necessity, be invoked, interpreted, and enforced, in the former as well as in the latter, the decisions of the state courts being, however, subject to review in certain cases by the Supreme Court of the nation. The court from which process to enforce a judgment is issued has such perfect control thereof that it may, for any proper cause, set it aside, or may stay it either temporarily or permanently, as may be requisite to prevent any abuse thereof.⁶¹ If this be true, why resort to the extraordinary and somewhat offensive remedy by injunction. If proceedings have been instituted, or are about to be instituted, to test the validity of the judgment; or if the judgment, though valid, cannot be enforced in the state court without undue sacrifice of the bankrupt's assets; or if, from any cause whatever, an emergency arises in which, in aid of the proceedings in bankruptcy, it is proper that execution should be stayed either temporarily or permanently, why not disclose the fact to the state court, and in it procure the requisite relief? In defence of injunctions against litigants in state courts, it was claimed that because these injunctions did not assume in direct terms to restrain *the courts*, they were not forbidden by the act of 1793, before referred to.

167; 1 Saw. C. C. 260; *Goddard v. Weaver*, 6 B. R. 440; *Eastburn v. Yardly*, 8 Pac. L. B. 127; 30 Leg. Int. 404; *Iron M. Co.*, 9 Blatchf. 320; *In re Wilbur*, 3 B. R. 71; *High on Injunctions*, § 214; *In re Hanna*, 4 B. R. 412; *In re Brinkman*, 6 B. R. 541.

⁶¹ Freeman on Executions, sec. 32.

But surely statutes are not enacted with the view of preserving matters of form, and permitting the sacrifice of matters of substance. Every act ought to be characterized by the result which it accomplishes, and which it was designed to accomplish, rather than by the deceptive guise in which it is sought to be perpetrated. The difference between destroying a court and prohibiting all litigants from resorting to it for redress is, in the eyes of justice, an immaterial difference. By conceding the right to enjoin the litigants from proceeding in a particular action, we, in effect, concede the right to enjoin the court from so proceeding.

A. C. FREEMAN.

SACRAMENTO, CAL.

V. A CHAPTER IN LEGAL BIBLIOGRAPHY—THE OLD ABRIDGMENTS.

STATHAM, FITZHERBERT, BROOKE, AND ROLLE.

STATHAM's Abridgment of the Law, folio.

In French, without title, date, or pagination. This work, the first of the Abridgments of the Law, and the first English law book ever printed, is a kind of digest, containing most of the titles of the law, arranged in alphabetical order, and comprising under each head adjudged cases from the reign of Edward I to the end of the reign of Henry VI, concisely abridged from the Year Books, together with many original cases not extant in the Year Books of those reigns. It has served as a model for others in later times, but was superseded by the abridgment of Fitzherbert, which was published about the same period. The author, Nicholas Statham, was Baron of the Exchequer in the reign of Edward IV. There is only one edition, which is in folio, without date, and is supposed to have been printed by W. Tailleux, at Rouen, for Pynson; at the end of the Table are the words: "Per me, R. Pynson," and at the end of the volume is Tailleux's device.

In a copy of Statham, which formerly belonged to Sir John Romilly,¹ Master of the Rolls, are these notes:

"Printed in the first year of the reign of Henry the Sixth, late King of England, in the year of our Lord 1422. Since that time is 286 years."

"The above note seems to be wrote in the year 1708. But as to the printing of this Book so early as the year 1422 is a great mistake, for there does not appear to have been any printing, either in England or elsewhere, so early as that year. Besides the last case of the 3d page b. of this book is

¹ Now before the writer.

mentioned to be in Trinity Term, 38 Hen. 6 in the year 1460. So that this book must have been printed after that time from this very quotation. J. BOOTH."

"The work was printed at Rouen, by Guillaume Tailleur, for Richard Pynson. JOHN ROMILLY."

This Abridgment consists of 380 pages, and is a *chef-d'œuvre* of splendid typography, the singular beauty of which has rarely been exceeded in modern times. "The paper is of a very firm, silky texture," says Judge Story, "forming a strong contrast to the sleazy linen and cotton of our day; the ink is of a bright jetty and unfaded black; the type, though small, and partly composed of abbreviated characters, has a sharp and distinct face; and the mechanical execution is so exact, that scarcely a letter exhibits a blur, and the surface of every page presents a uniform appearance, putting to shame many of the standard volumes of our times."

In "Fuller's Worthies," published in 1662,² is the following account of our author, *sub nom.*, John Statham:

"He was born in this county [Derbyshire], in the reign of King Henry the Sixth; and was a learned man in the laws, whereof he wrote an 'Abridgment,' much esteemed at this day for the antiquity thereof: for otherwise lawyers behold him (as soldiers do bows and arrows, since the invention of guns,) rather for sight than service. Yea, a grandee in that profession hath informed me that little of Statham (if any at all) is law at this day; so much is the practice thereof altered; whereof the learned in that faculty will give a satisfactory account; though otherwise it may seem strange that, reason continuing always, the same law grounded thereon should be capable of so great alternation. The first and last time I opened this author I lighted on this passage: 'Molendinarius de Matlock tollavit bis, es quod ipse audivit Rectorem de eadem villâ dicere in Dominicâ Ram. Palm. Tolle, tolle.'³ 'The miller of Matlock took toll twice because he heard the rector of the parish read on Palm Sunday, Tolle,

² We print from the edition of 1811.

³ Statham, tit. Toll. last case of the title.

tolle, *i. e.*, Crucify him, crucify him.' ⁴ But if this be the fruit of Latin service, to encourage men in felony, let ours read in plain English."

FITZHERBERT'S "Grand Abridgment of the Laws."

This is one of the most ancient and authentic legal records, containing a great number of original authorities, quoted by different authors, which are not extant in the Year Books, or elsewhere to be met with in print.⁵ It has also the advantage of being a very copious and useful common-place book or, index to the Year Books. The author was a judge of the Common Pleas in the reign of Henry VIII.

Of this author old Fuller wrote :

"Sir ANTHONY FITZ-HERBERT, son of Ralph Fitz-Herbert, Esquire, was born at Norbury, in this county [Derbyshire]. He was first the King's Sergeant at Law, and was afterwards, in the fourteenth of King Henry the Eighth, made one of the Justices of the Common Pleas; so continuing until the thirtieth year of the said King, when he died. He wrote the excellent book, 'De Natura Brevium,' with a great and laborious 'Abridgment of the Laws,' and a Kalender and Index thereunto; monuments which will longer continue his memory than the flat blew marble stone in Norbury Church under which he lieth interred."

"Mr. Fitzherbert," wrote Fulbecke in 1599,⁶ "must needs be commended for great pains, and for well contriving that which was confusedly mingled together in many Year Books; but he was more beholden to nature than to art; and whilst he labored to be judicial, he had no precise care of methodical points; but as he was in conceit slow, so he was in conclusion sure; and in the 'Treatises' which be of his own penning, he showeth great judgment, sound reason, much reading, perfect experience, and in the whole conveyance of his discourses giveth sufficient proof that he sought rather to decide than to devise doubtful questions."

The first edition of the 'Abridgment,' which is a very cor-

⁴ It is the gospel appointed for the day.

⁵ Co Litt. 24 a. 370 a.

⁶ Study of the Law, p. 71, ed. 1808.

rect edition,⁷ was printed in 1516.⁸ It was again printed by R. Tottell in 1655, two volumes, royal paper; and with additional general Table by J. Rastell, in 1577, 4to.

The new "Natura Brevium" was also written by Sir Anthony Fitzherbert. This work on the nature of writs is of the greatest authority.⁹ Lord Coke terms it "an exact work exquisitely penned." It was first printed in French, in 1534, 8vo., and has been frequently reprinted. The last edition was in 1794, two volumes, 8vo., in English.

BROOKE'S "Grand Abridgment of the Law."

In this work, which is disposed under more titles than that of Fitzherbert, many readings are abridged which are not now extant, except in a volume entitled "Brooke's New Cases."¹⁰ Of this author, in companion with Fitzherbert, Fulbecke says: "In the facility and compendious form of abridging cases he carrieth away the garland."¹¹ The Abridgment has the advantage also of having marginal notes of the points decided. Lord Coke calls it "an excellent repertory or table for the Year Books."¹²

Sir Robert Brooke was Chief Justice of the Common Pleas in the reign of Philip and Mary.

The first edition was printed in 1568, 4to.; it was reprinted in 1570 and in 1576; in 1573 it was reprinted in two volumes, royal paper, by R. Tottell, and again in 1586.

In "Fuller's Worthies" is the following note:

"Reader, be charitably pleased that this note may (till better information) preserve the right of this county [Suffolk] until Sir Robert Brooke, a great lawyer and Lord Chief Justice of the Common Pleas in the reign of Queen Mary. He wrote an abridgment of the whole law, a book of high ac-

⁷ See a remarkable instance, tit. Coron. 329; 2 Hale P. C. 57.

⁸ Some bibliographers have stated that it was printed in 1514.

⁹ Kettle v. Bromsall, Willes, 120; Jefferson v. Bishop of Durham, 1 B. & P. 122, *per* Eyre, C. J.; Lord Tenderden, C. J., in Rennell v. The Bishop of Lincoln, 7 B. & C. 196.

¹⁰ A reprint of this book, together with March's translation, was published in London in 1873. It is exquisitely printed.

¹¹ Study of the Law, pp. 71, 72, ed. 1808.

¹² 10 Rep. Preface.

count. It insinueth to me a probability of his berth herein, because (lawyers generally purchase near the place of their berth) his posterity still flourish in a worshipful equipage at Nacton, nigh Ipswich, in this county."

"The character of the abridgments of Fitzherbert and Brooke," says Judge Story,¹³ "may be summed up in a few words. They are mere indexes, under general heads, of the principal adjudged cases up to their own times, in which the points are accurately stated, but without any intention to order, or any attempt at classification. As repositories of the old law, they now maintain a very considerable value, and may be consulted with advantage. Whoever examines them (for a thorough perusal will be a mere waste of time) will probably feel inclined, when he can, to ascend to the original sources; but if these should not be within his reach, he may rely with confidence that these learned judges have not indulged themselves in a careless transcription, or a loose statement of the law. In our own practice we have frequently found them the safest guides to the old law, and particularly to the contents of the Year Books. At the times when these abridgments were originally published, they must have been very acceptable presents to the profession. But many of the titles are now obsolete; and the works lie on the dusty shelves of our libraries, rarely disturbed, except upon some extraordinary inquiry, touching the feudal tenures, or the doctrine of seizin. The modest motto prefixed to both of them deserves to be remembered: *Ne moy reproves sauns cause, car mon entent est de bon amour.*"

In a very recent case Chief Baron Kelly cited this work as one of "great authority."¹⁴ And Sir T. Clarke, M. R., likewise observed that Brooke's opinions "have generally been thought of very great authority."¹⁵

Lord Bacon, referring to Fitzherbert's and Brooke's "Abridgments,"¹⁶ wrote: "For the Abridgments, I could

¹³ Miscellaneous Works, pp. 384, 385, ed. 1852.

¹⁴ Morton v. Woods, L. R. 4 Q. B. 305.

¹⁵ Burgess v. Wheate, 1 Eden, 199.

¹⁶ "Those two great 'Abridgments,' " says Lord Coke.

wish, if it were possible, that none might use them but such as had read the course first; that they might serve for repositories to learned lawyers, and not to make a lawyer in haste; but since that cannot be, I wish there were a good abridgment composed of the two that are extant, and in better order."¹⁷

ROLLE'S "Abridgment of Cases and Resolutions in the Law."

According to Lord Campbell, Rolle, while a student at the Inner Temple, London, "composed that wonderful Digest which, with additions and corrections made by him in after life, was given to the world under the title of 'Rolle's Abridgment,' and which shows not only stupendous industry, but a fine analytical head for legal divisions and distinctions."¹⁸ There is a "Preface" addressed to young students in the law of England, by Sir Matthew Hale,¹⁹ which has been reprinted in the first volume of the "Collectanea Juridica."

In this Abridgment the more obsolete titles of the law in Fitzherbert and Brooke are omitted; and besides the printed books extant in Lord Rolle's time, it abridges many of the Parliamentary Rolls and other authentic records, and contains many cases which came under the author's personal observation and which are not elsewhere to be found.

Mr. Hargrave speaks of this work as excellent in its kind, and in point of method, succinctness, legal precision, and many other respects, fit to be proposed as an example for other abridgments of the law.²⁰ And Mr. Justice Patteson speaks of "the great learning and accuracy of Rolle."²¹ Judge Story says that the chief advantage that it possesses over the earlier compilations is in a more scientific arrangement of the materials, and a greater subdivision of the general heads, so as to bring together matters of the same nature

¹⁷ "Proposition Touching the Amendment of the Laws," Works, vol. XIII, p. 70, ed. Spedding.

¹⁸ Lives of the Chief Justices, vol. 2, p. 49, 3d ed.

¹⁹ "Lord Rolle was a very learned man, and his 'Abridgment' was published by Lord Hale, perhaps the greatest man of the law that ever was." Lord Holt, in *The City of London v. Wood*, 12 Mod. 689.

²⁰ Co. Litt. 9 a, note.

²¹ *The Queen v. Isle of Ely*, 15 Q. B. 842.

or relative to the same branch, instead of heaping them up in one undistinguishing mass.

Henry Rolle was Chief Justice of the Upper Bench from 1648 to 1655. The work was printed in 1668, in two volumes, folio, in French.

The preceding works constitute the principal of the old Abridgments. We have purposely passed over Hughes', which was published in three volumes, 4to., 1660-1663; and Sheppard's, which was printed in 1675, in three volumes, 4to.;²² and also Nelson's, which is chiefly, and very inaccurately, copied from Hughes, and published in 1725-6, in three volumes, folio.²³ "D'Anoeri's Abridgment," which extends only to title "Extinguishment," is a translation of Rolle's, with the addition of some more modern cases, which latter are printed in Roman letter by way of distinction. The second edition was printed in three volumes, folio, in 1725, 1732, 1737.

Sir Edward Coke, in more instances than one, has warned the reader against the danger of relying on abridgments. "The advised and orderly reading over of the books at large I absolutely determine to be the right way of enduring and perfect knowledge, and to use abridgments as tables, and to turn only to the books at large."²⁴ And Lord Ellenborough, C. J., once judicially observed that "it is extremely important, where citations are made from the Year Books in the Abridgments, to look at the cases themselves from which the *dicta* are imported; for I have often found that a reference to the original case gives a very different meaning to the passage cited."²⁵

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NATICK, MASS.

²² "Sir T. Clarke, M. R., said that it was one of the best of the Abridgments.—MSS. note in the copy in Lincoln's Inn Library, printed in 'The London Law Magazine,' vol. 1, p. 578, note. "Not disreputable in its execution."—Story, Miscellaneous Writings, p. 385.

²³ Nelson abridges only cases in the books printed since those in Fitzherbert and Brooke and the Year Books, which this author treats as a rhapsody of antiquated law. *Vide* preface to 13th volume of Viner. Bridgman's Legal Bibliography, p. 227.

²⁴ 4 Rep. Preface; 5 Rep. 25; 10 Rep. 117 b.

²⁵ Burdett v. Abbot, 14 East, 155. See, also, an instance in Mary Portington's case, 10 Rep. 41 a.

VI. AN AMERICAN PHASE OF TWYNE'S CASE.

The Supreme Court of the United States has recently thrown the weight of its authority into the scale, which was already well weighted by decisions of numerous of our state courts, in favor of a principle of law which, nevertheless, has been so controverted and disputed in many quarters as to give rise to much doubt. The question, if theretofore an open one, must now be regarded as settled by the very comprehensive enunciation of the true rule by our highest court. It established a doctrine which had its origin in England, but which has been so effectually transplanted, and has developed so extensive a growth in the soil of our jurisprudence, by reason of its adaptation to the exigencies of our commercial interests, that it may well be called an American doctrine. It is held by the supreme bench, without dissent, in *Robinson v. Elliott*, 22 Wall. 513, that a chattel mortgage upon a stock of goods in trade, which permits the mortgagor to remain in possession of the property, and in the disposition of it by sale in due course of trade, until the maturity of the debt proposed to be secured by it, is fraudulent in law as to other creditors, and is absolutely null and void as to them, without reference to the *bona fides* of the mortgage debt, or the intentions of the mortgagor as to fraud. The leading features of the somewhat complex rule thus announced are, that fraud is a legal question; that a necessary tendency to fraud in such transactions may be recognized by the courts; and, if recognized, the law imputes to the transaction an essentially fraudulent purpose; and that this is a question for the court to determine, and not for a jury, who are to enquire only as to the actual fraudulent intent of the parties, in cases properly turning upon such intent. From this it will necessarily result that our American jurisprudence must dispense

with the old distinctions between "actual fraud" and "constructive fraud," and must present a more clear and philosophical classification of the protean shapes which characterize fraud in such conveyances. The fraud which the court found inherent in the instrument, in that case, was no less "actual" than if a jury had found it to be so intended by the parties.

The preponderance of authorities in our various state courts of last resort was previously so great in favor of this doctrine that it might have been, and by many was believed to be already, the well-settled law in America. But in the late case of *Brett v. Carter*, 3 Cent. Law Jour. 286, Lowell, J. of the United States District Court for Massachusetts, ventured "to doubt both the generality and justice" of the doctrine as announced in *Robinson v. Elliott*, and dissented from it as a new doctrine of only local application. His opinion states so forcibly the leading objections offered to this rule of law, is so boldly critical as to the decision of his superior tribunal, and represents the views of so many honest doubters, that it becomes desirable to examine closely the doctrine in question, inspect its foundations, and trace its growth.

Brett v. Carter was a bill in equity by an assignee in bankruptcy of the mortgagor against the mortgagee of a stock of stationery. The debt was for the purchase money of the stock of goods, sold by the mortgagee on a credit, the notes maturing at different times during four years. The mortgagor was permitted by his creditor to sell the goods in the ordinary course of his trade. It did not appear, however, that any provision to this effect was incorporated into the writings. This feature of the case must be observed, in view of the distinction which some jurists have taken that in all cases where the provision allowing the debtor to sell the goods does not appear on the face of the instrument, but is shown by evidence *aliunde*, the court will not find fraud in law, but will leave it to the jury to find fraud in fact. The language used by Lowell, J., was as follows:

"The Court of Appeals of New York decided, by a bench equally divided in opinion, that a mortgage of chattels which permits the mortgagor to continue in possession and

to sell the goods in the ordinary course of business, is void on its face as mere matter of law. *Griswold v. Sheldon*, 4 Comst. 581. This doctrine has had a remarkable vitality, considering the feebleness of its birth, to have become the law of New York, Ohio, and Illinois, and probably of some other states. It is not the law of England, Maine, Massachusetts, Michigan, or Iowa, and probably of some other states. But as this new doctrine has been said by the high authority of Mr. Justice Davis, of the Supreme Court of the United States, to be so general and just that it may be presumed to be the law of Indiana, in the absence of express and unambiguous decisions of the courts of that state to the contrary, and as I ventured to doubt both the generality and the justice of the doctrine, it becomes me, with all the respect I feel for that opinion, to state my reasons for not acceding to it. If the rule, whichever way it may be, were a settled rule of property in Massachusetts, enquiry into its history or justice would be unnecessary. But although I believe my decision will accord with the law of Massachusetts, I have not found a case in that state, reported since the decisions in New York were made, or, at least, with any reference to those decisions, and it is, perhaps, still a question for discussion in this commonwealth whether this new doctrine is sound. I call it a new doctrine because I had supposed it to be well settled, after much debate and conflict of opinion certainly, but substantially settled, that when a vendor or mortgagor was permitted to retain the possession and control of his goods, and act as apparent owner, with or without power to sell them, the question whether this was a fraud or not was one of a fact in each case, excepting under a peculiar clause in the bankrupt law of England which has not been adopted in this country. The law is so stated by Mr. May in his valuable treatise on *Voluntary and Fraudulent Conveyances*, page 126, and in the cases he cites, and by the learned editors of *Smith's Leading Cases*. Notes to *Twyne's case*, vol. 1, p. 1, etc. By the law of England, as I understand it, there are no constructive or artificial frauds, or, if the term is preferred, frauds in law, remaining, excepting, 1st, such as are expressly made

so by statute, as, for instance, when a bankrupt retains the order and disposition of goods as apparent owner, with the consent of the true owner—a provision which we have not adopted, as I have already said, and as was somewhat emphatically said in a late case in the Supreme Court (*Sawyer v. Tenpin*); 2d, where the act is necessarily a fraud on creditors, as where an insolvent person gives away a part of his estate for no valuable consideration, or conveys the whole of it, as payment or security, to one or a few antecedent creditors. These, to be sure, are examples, but very few others could be adduced; and I understand the two laws, both here and in England, to have been, until lately, that a conveyance purporting to be, and actually being, for a valuable present consideration, is never a fraud in law on the face of the deed; and if fraud is alleged to exist, it must be proved as a fact; and that this was the law even before registration was required of mortgages and bills of sale of chattels.

“It is very strange that after our legislatures have met the difficulties of *Twyne's case* by requiring registration, which gives not only constructive, but, in most cases, actual, notice of mortgages, and after many of them have provided that fraud shall be a question of fact for the jury, the decisions which I have cited, and others following them, should have reverted to the harder doctrine, which had already grown obsolete, that such deeds should be held void in law if the mortgagor retained possession and control. This is all that those cases amount to.

“If it be said that fraud is a necessary result of the deed, all I can say is that this brings us to an ultimate fact of observation and experience; and I am unable to see the necessity. Indeed, it is much more difficult for me to see how creditors can be defrauded in such a case, when they are told in the deed itself that the debtor has no credit and no property that he can call his own. I can see the fraud upon a mortgagee who has paid for the whole stock, and loses it in this legal fiction. Take this very case as an illustration. It is admitted there was no fraud in fact; that the trader's whole stock was supplied by the defendant; that the mortgage

shows that all the stock, present and future, is hypothecated, not as a cover or blind, for there was none, but to the payment of a certain honest debt by certain fixed installments. I am asked to find fraud in law, when I know, and it is admitted, there was none in fact. No such law obtains at present in Massachusetts and other states that I have already mentioned, and I cannot adopt it. The doctrine is combatted with great force of reasoning, much greater than has ever been expended in its support, in the two cases following, to which I have great pleasure in referring: *Hughes v. Cory*, 20 Iowa, 399, and *Gay v. Bidwell*, 7 Mich. 519."

These positive views of Judge Lowell are stated with all the earnestness of conviction. To fully illustrate the character of the issue presented between him and the appellate court, it is only necessary to quote the equally incisive language of Mr. Justice Davis in 22 Wall. 525, 6:

"In truth, the mortgage, if it can be so called, is but an expression of confidence, for there can be no real security where there is no certain lien. Whatever may have been the motive which actuated the parties to this instrument, it is manifest that the necessary result of what they did was to allow the mortgagors, under cover of the mortgage, to sell the goods as their own, and appropriate the proceeds to their own purposes, and this, too, for an indefinite length of time. A mortgage which in its very terms contemplates such results, besides being no security to the mortgagees, operates in the most effectual manner to ward off other creditors. And when the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose. The views we have taken of this case harmonize with the English common law doctrine, and are sustained by a number of American decisions."

In this case the stipulation allowing the debtor to remain in the possession, control and disposition of the stock of goods, appeared on the face of the instrument.

The contrary inferences drawn by these two opinions as to the law of England on this point are no more striking

than the differences they disclose as to the duty of a judicial opinion on the subject. The Supreme Court finds itself impelled to the conclusive presumption and imputation of fraud from the facts as stated. Judge Lowell does not think the court should have, or that the law does have, any opinion at all on the subject. That the difference between an agreement on the face of the instrument and one proved *aliunde* does not afford room for any distinctions as to this question of fraud in law, we think will be sufficiently clear from the adjudicated cases. If it shall appear on investigation that the Massachusetts judge has failed to inform himself as to the genesis of the doctrine he questions, has perceived and apprehended only a part of the legitimate results of Twyne's case, and is unable to see or apprehend the extent to which frauds may be perpetrated under cover of his theories, he may be excused for doubting the justice of the rule in *Robinson v. Elliott*, which is so apparent to Mr. Justice Davis.

That the doctrine in question is of English origin, is plain from the English cases; yet it is not generally recognized by the text writers to be so. It is clearly traceable to Twyne's case, 3 Coke, 80; and it is so plainly adopted into our American jurisprudence in precisely the form announced in the *Star Chamber*, while virtually outgrown and practically abandoned in England, that we have ventured to style it an American phase of that celebrated case. Besides, it has come to us with less variation from its original form than have any other of the principles announced in that case; and it is, perhaps, the most important of them all. Attention is invited at the outset to the fact that it is not the mere question of the possession of the goods by the debtor that is now to be looked to as the leading question of that case. The learned American editors of *Smith's Leading Cases*, in their notes on Twyne's case (vol. 1, p. 47), have given their chief attention to the question of possession, practically overlooking the one now under consideration, which seems at last to be coming to the front as the main or foundation principle on which Twyne's case rests. So we may ignore entirely all the learned and ear-

nest controversies of the earlier decades of this century over the questions, whether possession under a mortgage is either *prima facie* or conclusively fraudulent, or what explanation of such possession will suffice to negative the suspicion of fraud. Nor is it a question to be settled by reference to our American registration laws. It is but a superficial view of Twyne's case which holds that all its "difficulties" have been met by legislation requiring chattel mortgages to be registered. The secret character of the conveyance in that ancient case was but one of its badges of fraud. But the question to be discussed is one of a fraudulent tendency, lying at the foundation of the whole transaction, and so permeating it—honeycombing it, as it were—with fraud, as to vitiate it utterly, beyond the power of a mere registration, or the best intentions of the grantor, to redeem and purify it. And it is a question, too, as already indicated, whether the courts have a duty in the premises—namely, the duty to throttle fraud when they meet it, as a matter of law—or whether they may safely and properly abrogate all power over and opinion upon the subject, even where statutes have said that fraudulent intent shall be a question for juries.

The rule of Twyne's case which is applied in *Robinson v. Elliott*, is illustrated in the second resolution of the Star Chamber, viz.: "The donor continued in possession, and used them as his own; and by reason thereof he traded and trafficked with others, and defrauded and deceived them;" and in the fifth resolution, which is allied to, if not drawn from and depending on, the second, viz.: "Here was a trust between the parties, for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and trust is the cover of fraud." If one be indebted to several, and makes a gift of all his goods to one creditor in satisfaction of his debt, says the learned reporter, "but there is a trust between them that the donee shall deal favorably with him in regard of his poor estate, either to permit the donor, or some other for him, or for his benefit, to use or have possession of them, *and is contented that he shall pay him his debt when he is able,*

this shall not be called *bona fide*." This language, though applied to a supposed case of a sale or a gift—perhaps secret, as in Twyne's case—yet describes very aptly the result of all cases under mortgages, such as Robinson v. Elliott, or Brett v. Carter. Publicity, notice, registration, actual consideration, all fade into immateriality in view of an agreement under a mortgage that the mortgagor shall continue to use the goods as "his own proper goods," and practically shall pay his secured creditor when he is able, or is ready, to do so; for that is all that is in reality left of the arrangement miscalled a mortgage. Later English cases have not, perhaps, announced this vicious principle, in the most apt terms, as the reason for their decisions. But, in the cases below referred to, the fact notably existed of a reservation of this kind by the debtor for his benefit. It has been often said that courts may, and do frequently, give most correct judgments without illustrating them by the sound logical reasoning that might have been presented as their inherent strength and support. Doubtless, in England as in America, jurists have felt the full force of the facts of the case, and the necessarily fraudulent tendency of a reservation of a power of sale and disposition under such conveyance, without expressing their feelings and convictions in apt terms. Especially may we accept this as the fact when we find them referring, without further explanation, to Twyne's case as authority.

The earliest reported case, after Twyne's case, is Ryall v. Rawles, 1 Ves. Sr. 348, arising in 1749. This was a case of a mortgage of utensils and stock of goods in trade of a brewer, the mortgagor having not only retained possession, but continued, as usual, with his business. (It is reported, also, as Ryall v. Rolle, in 1 Atk. 165.)

The case was considered under the statute 21 Jac. I, c. 19, relating to insolvencies. But the principle under discussion, which had its origin prior to that statute, was found to be involved, and was adjudicated. Burnet, J., said: "The leading case on this is Twyne's case, where it is held that it was upon a valuable consideration, but not *bona fide*, from

the continuing in possession and trading therewith. It is difficult, unless in very special cases, to assign a reason why an absolute or conditional vendee of goods should leave them with the vendor, unless to procure a collusive credit; and it is the same whether in absolute or conditional sales."

Worseley v. De Mattos, 1 Burr. 467, was determined in 1758. One Slader had mortgaged all his goods, materials and stock in trade as a brewer, as security for debt, and had authorized the mortgagee to enter and take possession upon default of payment. A feigned issue was sent out of chancery to determine whether Slader, by this mortgage, had committed an act of bankruptcy. It was held that he had, not by virtue of any provision of the statutes of bankruptcy, but because the transaction was fraudulent as to creditors, under 13 Eliz., though made by way of security and for a valuable consideration. Lord Mansfield cited the second resolution in *Twyne's case*, and said: "By the express tenor of the deed, Slader was to have the absolute order and disposition as before. In fact, he was permitted to continue in possession and *act as owner*. They who dealt with him trusted to his visible trade and stock. They trusted to the bankrupt law, that he could neither have sold or mortgaged; and in case of a misfortune, that his effects must be equally distributed. They were imposed on by false appearances."

Next in order of time came the celebrated case of *Edwards v. Harben*, 2 Term Rep. 587, involving a bill of sale of household furniture, medicines, and a stock in trade, of which possession was not to be delivered until after fourteen days from the date of the bill, which was in effect a mortgage, being given to secure a debt. Possession was not, in fact, taken under it until after the death of the grantor. Buller, J., said, in deciding the case: "We are all of opinion that if there is nothing but the absolute conveyance without the possession, that, in point of law, is fraudulent." The power over and disposition in trade of the stock of goods were urged upon the court, by the counsel attacking the conveyance, as material to show the fraud; and though these features are not specifically mentioned by the court, yet it is difficult to

avoid the idea that they influenced the decision of the court. But this case has been followed as a precedent for the rule that possession alone, when reserved, renders a mortgage of chattels fraudulent. It is with reference to this case that Mr. Cowen, in his note to *Bissell v. Hopkins*, 3 Cowen, 166, criticises the rule above named, enumerates his much-mooted twenty-four exceptions to that rule which he finds then already established by decisions in England and America, and says: "What does the rule amount to? what is it worth? and does its preservation merit a struggle? Some of the exceptions are almost as broad as the rule itself" (p. 203). In our present view of *Edwards v. Harben*, that case may well stand as an authority, without conflicting with the cases that exhibit exceptions to the supposed rule.

In *Paget v. Perchard*, 1 Esp. 205 (1795), one Mrs. Spencer, an innkeeper, had given to her distillers a bill of sale of all her effects, including the liquors in the house, as well as furniture. The grantees were in possession, yet they had permitted Mrs. S. to sell liquors in the usual way of trade, for one day, and to receive the money, not accounting for it to them. Lord Kenyon said: "That the allowing Mrs. Spencer to appear, as usual, mistress of the house, and to execute acts of ownership, after having parted with all her property by the bill of sale, was inconsistent with such situation, and a sufficient evidence of fraud as against *bona fide* executions;" and he therefore directed a nonsuit, thus evidencing his view of the judicial duty to declare a fraud.

Worrall v. Smith, 1 Campb. 332, decided by Lord Ellenborough in 1808, is a case much like the preceding, in which the rule is enforced with strictness.

In *Benton v. Thornhill*, 7 Taunt. 149, which is sometimes cited as a contrary authority, there was conflicting evidence, which was left to the jury, and their verdict substantially determined that the mortgagee did not assent to the acts of ownership on the part of the mortgagor.

In adverting to the American decisions on this subject, attention is first invited to those from Virginia, both because the first one in point of time emanated thence, as well as

because the language of that first opinion has not been excelled in the terseness and perspicuity with which the fraudulent tendencies, inherent in these transactions, are exposed. This is the case of *Lang v. Lee*, decided in 1825, and reported in 3 Rand. 410.

The deed in trust conveyed a stock of goods, stipulating that "the goods are to remain in the possession of the said Lee, and he is empowered to make sales of them, always accounting with the trustee herein named, if required to do so." Carr, J., used the following language (p. 423):

"Now I ask, what possible security could the deed furnish, encumbered with a stipulation like this? Is it not completely a *felo de se*? A security is taken on goods, and they are left in the possession of the debtor for ten months, with a power to sell and dispose of them as he may think proper; no check whatever; for the clause about accounting relates only to the money for which he has sold the goods. Does not this resolve the whole matter into personal security? And is the debtor more bound to account for the money than he was before for the debt? * * * Suppose he had sold every article in the store the next day, could Lang call back the goods? Certainly not, for he had given Lee express power to sell. As a security, then, this deed was naught. What other possible purpose could it have than to delay, hinder, or defraud, the creditors of Lee? The reason of *Edwards v. Harben*, *Hamilton v. Russell*, etc., applies strongly to this case."

Again, "all the cases concur in the position, that if the power retained enable the grantor to defeat the provisions in the deed, it is null and void; and this, upon the known principles of the common law, of which the statutes on the subject of fraud are merely declaratory (p. 425). Now, can we imagine a power more completely adequate to the destruction of the avowed purpose of the deed than that retained by the grantor in this case? The goods, the identical articles of merchandise, constituted the sole security provided by the deed for the payment of the debts; and yet the debtor, while affecting to devote the goods to that purpose, retains the

possession, the use, the power of selling every article, to whom, in what manner, and on what terms, he pleases. He is to account, though, *if* called on. But is this more than a personal accountability? The goods are gone. You cannot follow them. The money received for them has no ear-mark. You cannot follow it though the grantor pay it away the moment after he receives it, in satisfaction of his own debt. What are you then, after all, but a general creditor? To this purpose, the case of *Ryall v. Rolle*, 1 Atk. 165, is very strong. That, it is true, was a case under the bankrupt acts, and they are particularly strong and high-toned on these subjects, especially 21 James I. Yet the quotations I shall make do not seem so much founded on them as deduced from the principles of the common law." He then quotes from Burnet, J., and Ld. Hardwicke, and says in a note to the same case: "I would not be understood to impugn the doctrine so well established, and applicable to the common case of mortgages and deeds of trust, that possession is no evidence of fraud, where it follows the deed, and is consistent with its purposes. My remarks, indeed, have been made to little purpose, if they have not shown the wide difference between such cases and that at bar."

In the later case of *Addington v. Etheridge*, 12 Gratt. 436 (1855), the trust deed provided that Harrison, the grantor, should keep possession of and sell the stock of goods in the usual line of his trade, and occupy the store, until default in the payment of any of the debts secured, or until the trustee should be requested by any of the creditors to close the deed by a sale. Daniel, J., held that "this power is one incompatible with the avowed purpose of the grantor to furnish an indemnity to his creditors; is equivalent, in its effects, to a full power of revocation; and fully adequate to the defeat of the provisions of the deed. And, therefore, that this deed is, according to the principles adjudicated by this court in the case of *Lang v. Lee*, 3 Rand. 410, * * * fraudulent *per se*, null and void."

The New York cases deserve careful attention, on account not only of their number, but also of the criticisms that have

been made upon them, examples of which are shown in the remarks of Mr. Justice Lowell already quoted, and in the charge of counsel in the case in 22 Wallace, that these cases have been "vacillating and unsatisfactory." But an examination of the leading cases from this state discloses far more harmony than discord.

Driver v. McLaughlin, the earliest case, reported in 2 Wend. 596, arose in the supreme court of the state in May, 1829. One Stephens, to secure a note for \$800, due in four months from its date, gave to McL. a mortgage on his goods and chattels in the house occupied by him, including, among others, his stock of goods in his grocery store. The mortgage provided that he was to remain in quiet and peaceable possession of the goods, *and in the full, free enjoyment of the same*. It appeared in evidence that the mortgagee had never taken possession of the property, but had allowed S. to continue to conduct business therewith until maturity of the debt, and thereafter indefinitely, on account of misfortunes of S. Three years after the mortgage was executed, Driver obtained a judgment against S., and levied on the stock of goods then in the store, being nominally the same stock mortgaged, but really different goods.

The court decided, among other things, that the retention of possession and the actual selling of goods by the debtor, without accounting to the creditor, rendered the mortgage fraudulent in law, and void as to the fixtures and standing casks no less than as to the goods. It was held that on a conceded or settled state of the facts, fraud is a question of law. It was said, "To sanction a transaction like this would open a door to frauds innumerable, and to an extent incalculable."

McLachlan v. Wright, 3 Wend. 348 (1829), resembled the preceding case, the stipulations being similar, and the property conveyed being a brewer's stock of beer, malt, and hops, with utensils, furniture, etc. The debtor remained in charge, and sold goods without accounting to his creditor, or being required to do so. The verdict of a jury that this transaction was fraudulent was sustained as a matter of law on the ground that the debtor not only retained posses-

sion of the property, "*but used and disposed of it as his own.*"

Wood v. Lowry, 17 Wend. 492 (1837), occupies a leading position on this question. The debtor, a merchant, remained in possession, and "proceeded to sell the goods in the usual course of business as a country merchant, and in other respects used them as his own." The jury was instructed that if the effect of this arrangement would be "to hinder, delay, and defraud creditors, they were authorized to *infer*, and ought to infer, that such was his intent." Branson, J., pronouncing the opinion of the court, said, "Kellogg was not the agent or servant of the plaintiffs to sell the goods and account to them for the proceeds, but was avowedly in business for himself. He had the possession of the property, with full authority, by the express assent of the plaintiffs, to sell and dispose of it at his pleasure, and to deal with it in all respects as other merchants did with their merchandise. It is true that Kellogg said he would remit to the plaintiffs the avails of such property as he should sell before the first of June; but this was mere matter of confidence between the parties; it was no part of the contract under which plaintiffs make title. The property was not left with Kellogg, to be kept until the debt was paid or the plaintiffs should call for it, but he had it for the purpose of trading with it, and making profits from the sale of it. When sold, the fruits were his own, except that, like every other debtor, he was under an obligation to satisfy the demands of his own creditors. He treated the property as his own. It is impossible to say that the plaintiffs had any legal claim to it as against the creditors of Kellogg or purchasers under him." "Instead of leaving the matter to the jury, as a question of fact, for their determination, the judge would have been well warranted in instructing them that the transaction was fraudulent and void in law, and that the defendants were entitled to a verdict in their favor."

The question was mooted again, though it did not fairly arise and was not decided, in Stoddard v. Butler, 20 Wend. 507. It was a case of an assignment of a stock in trade by way of mortgage, the assignor being left in possession, to sell

as agent only, for the benefit of the grantees. Chancellor Walworth's decision, holding this assignment fraudulent and void, was reported in 7 Paige, 163, *sub nom.* Butler v. Stoddard. Upon appeal, this decree was affirmed in the Court of Appeals by a divided court. Though no principle was thus settled, yet the free and exhaustive opinions of several of the senators on both sides are interesting and valuable contributions to the literature of this subject.

The decision in Wood v. Lowry corrected the errors introduced by the contrary case of Levy v. Welsh, 2 Edw. Ch. 438 (1835), in which Vice-Chancellor McCann held a mortgage of a certain stock of goods, with all the grantor might acquire, to be only *prima facie* fraudulent, and open to explanation. Smith v. Acker, 23 Wend. 653, cannot be considered a discordant case. There it was not perishable or trading property, but a printing press, that was mortgaged. Though the mortgagor was to remain in "the full and free enjoyment of it," this could scarcely intend a sale of the press. Any question of a fraudulent intent in such a case would be properly submitted to a jury.

In Griswold v. Sheldon, 4 N. Y. 581 (April, 1851), the court were, indeed, divided as to the reasons for their decision, though they concurred in the result. But the difference was certainly not such as to change the rule already well established in Wood v. Lowry. Bronson, C. J., who had delivered the opinion in that case, now had the concurrence of Ruggles, Jewett, and McCann (the latter the former Vice-Chancellor, who decided Levy v. Welsh), in the ruling that a mortgage of goods was fraudulent in law where the intention appeared *aliunde* to allow sales of goods in the usual course of trade. Four other judges held that, as the fact appeared *dehors* the deed, it could not be held fraudulent in law *upon its face*, but that the question must be left to a jury.

Edgell v. Hart soon followed. It was decided in the supreme court in June, 1851 (13 Barb. 380), without reference to Griswold v. Sheldon. The decision of the Court of Appeals in 1853 (9 N. Y. 213), closed the question left open

in 4 N. Y. The license to sell in this case was inferred from a written schedule attached to the instrument. Denio, C. J., held, with the concurrence of a majority of the court, that "the existence of such a provision, *out of the mortgage or in it*, would invalidate it *as matter of law*, and that, where the facts are undisputed, the court should so declare."

In 1859 was presented the case of Gardner v. McEwen, 19 N. Y. 123, in which no retreat is manifest from the position taken in Edgell v. Hart. Here the agreement to allow sales in course of trade did not appear on the face of the mortgage, nor was it proved. Denio, C. J., adhering to the doctrine of the last named case, held, that while the facts proved "made a pretty strong case for the jury," still it was one for themselves to determine. It is plain that here the question of doubt was as to the weight of proof and the facts proved. If the fatal fact should be finally "admitted or ascertained," the rule in Edgell v. Hart would apply, of fraud in law. It would seem that, upon clear proof, the court might direct a verdict of fraud in those states where such directions are allowed when the evidence is clear; substantially as was done in Paget v. Perchard by Lord Kenyon.

The two later cases of Mittnacht v. Kelly, 3 Keyes, 407 (1867), and Russell v. Winne, 37 N. Y. 591 (1868), present the question in both phases of the facts as to the reservation of a power of sale. In the former case the reservation appeared on the face of the mortgage; in the latter it was shown by facts *aliunde*. In both cases the mortgage was ruled to be fraudulent in law, following Edgell v. Hart and Wood v. Lowry.

In Mittnacht v. Kelly, Parker, J., said: "The mortgaging the whole stock in trade, *with the increase and decrease thereof*, and the providing for the continued possession of the mortgagor, can have no other meaning than that the mortgagee should all the time retain a lien on the whole stock, by way of mortgage, the mortgagor making purchases from time to time, and selling off in the ordinary manner, the intent being not to create an absolute lien on any property, but a fluctuating one, which should open to release that which should

be sold, and take in what should be newly purchased. This is just such an arrangement as was held in *Edgell v. Hart*, 9 N. Y. 213, to render the mortgage void. The case cannot be distinguished from that, and the law, as propounded in that case, must be held applicable to this" (p. 408).

And in *Russell v. Winne*, Grover, J., said: "The question is whether an agreement by the mortgagor that the latter may sell, for his own benefit and as his own, *portions* of the property covered by the mortgage, renders the mortgage fraudulent and void as to such portions. It would seem that the bare statement of the proposition would be sufficient to warrant an affirmative answer."

"If there is an agreement by the mortgagee that the mortgagor may sell or dispose of any of the property for his own benefit, it is established conclusively that the mortgage was given for some purpose other than that of securing a debt to the mortgagee, or of giving him any real interest in such property. It is evident that, as to such property, the mortgagee not having any real estate therein, such real interest remains in the mortgagor. Why, then, is the mortgage given upon such property? Evidently, the better to enable the mortgagor to enjoy the benefit thereof, at the expense of creditors. Were there no creditors of the mortgagor, there would be no object in giving or taking mortgages accompanied with such an agreement. It is, I think, clear that such an agreement shows that the mortgage was not made in good faith, and without a design to hinder creditors. *There is no question of intention to be submitted to a jury.* It already conclusively appears that, as to such property, the mortgage was not designed by the parties as an operative instrument between them, and its only operation must be to the prejudice of others. The court should, as to such property, pronounce it void, for the reason that the evidence conclusively shows it fraudulent."

Ford v. Williams, 24 N. Y. 359, *Conkling v. Shelly*, 28 N. Y. 360, and *Miller v. Lockwood*, 32 N. Y. 293, cannot be regarded as exceptional cases. In these cases it was a part of the agreement for sales by the mortgagor that he should remit

the proceeds to the mortgagee, which was held sufficient to sustain the arrangement, though not actually carried out by the mortgagor. In the latter case, however, Potter, J., dissented on the ground that the case really fell within the rule of *Wood v. Lowry* and *Edgell v. Hart*, so that there was no certain security.

Nor is it clear that the late case of *Yates v. Olmsted*, 56 N. Y. 632, is to be regarded as an exceptional case. The supreme court, as shown in 65 Barb. 43, followed the cases above referred to, and concluded that it was intended in this case to allow sales by the mortgagor in due course of trade, although the referee had found that the mortgagee had made no such agreement, and did not know that such sales were made. The dissenting opinion states that the mortgagee was not in the store during the existence of the mortgage, and relies on this fact as distinguishing the case. The Court of Appeals put their decision sustaining the mortgage, upon the finding of the referee as a determination of fact, from which it resulted that no agreement for sales was made, and no fraudulent intent existed.

This is the only case, if this be one, showing any substantial deflection from the rule established in *Wood v. Lowry* and *Edgell v. Hart*, and which was succinctly stated as follows in 37 N. Y.: "It may, therefore, be regarded as settled that an agreement between mortgagor and mortgagee, that the former may dispose of the mortgaged property to his own use, renders the mortgage fraudulent as to creditors, whether the agreement be contained in the mortgage or not." In *Frost v. Warren*, 42 N. Y. 204, the majority of the court sustained the verdict of the jury in favor of the conveyance, in view of the slight and unsatisfactory character of the evidence, while still recognizing the principle of law above stated. An exhaustive statement of all the New York cases has not been attempted, but sufficient citations have been made to show a clear and lively understanding, in the New York courts, of the legal fraud underlying all such so-called mortgages.

In New Hampshire the early case of *Coburn v. Pickering*, 3 N. H. 415 (1826), held that possession retained by the

mortgagor, under a mortgage, with the right to the full use of the property, rendered the mortgage fraudulent and void. This case went, perhaps, too far, inasmuch as the property mortgaged consisted of household goods, and it did not appear that their use was tantamount to their destruction. But the case is an instructive one, by reason not only of the very elaborate and well considered opinion of the court, in which the rule we are considering is drawn from Twyne's case, but also of the close and interesting argument of counsel seeking to uphold the mortgage. On the authority of this case the rule was applied to mortgages on stocks of goods with power of sale reserved, in the later cases of *Ranlett v. Blodgett*, 17 N. H. 298, and *Putnam v. Osgood*, 52 N. H. 148. In the last named case it appeared that the mortgage was given and received in good faith, and that there was no contemporaneous agreement that the mortgagor should continue selling; nevertheless, he did so continue, and with the knowledge of the mortgagee; and these facts, when proven, were held to establish fraud in law. Both this case and *Coburn v. Pickering* show that it is not alone possession, but it is a trust of any kind, reserved for the benefit of the mortgagor, that avoids a transaction of the kind; that this is the distinguishing feature of Twyne's case; and that, while the jury find the facts in all cases, the fraud is predicated of those facts by the court, as matter of law, in all cases. The same rules are applied to slightly different cases in *Coolidge v. Melvin*, 42 N. H. 510, and many other cases. The question of the debtor's intent is considered immaterial. "It is because such trusts are calculated to deceive and embarrass creditors, because they are not things to which honest debtors can have occasion to resort in sales of their property, and because they are the means which dishonest debtors commonly and ordinarily use to cheat their creditors, that the law does not permit a debtor to say that he used them for an honest purpose in any case." *Winkley v. Hill*, 9 N. H. 33; *Coolidge v. Melvin*, 42 N. H. 520. The New Hampshire court has aptly supplemented the criticisms made by other courts upon the loose, uncertain, and shifting character of

these so-called mortgages, by comparing them to kaleidoscopes, in *Ranlett v. Blodgett*, 17 N. H. 305.

The Supreme Court of Ohio, though later in point of time, was in no respect less incisive in its judgment upon such transactions, and no less felicitous in illustrating their pernicious character, than those of the other states already referred to. The case of *Collins v. Myers*, 16 Ohio, 547 (1847), has justly been assigned a leading position among those treating of the subject. It was a contest in equity between the assignees under a mortgage and judgment creditors of the mortgagor, who had continued to traffic with the stock of goods mortgaged; though the agreement permitting this appeared, not on the face of the instrument, but by proof *aliunde*. That the question arising out of these facts far transcends that of mere possession, is clearly shown. The language of the opinion has deservedly become proverbial. "The object of a mortgage is to obtain a security beyond a simple reliance on the honesty and ability of the debtor to pay, and to guard against the risk of all the property of the debtor being swept off by other creditors, by fastening a specific lien upon that covered by the mortgage. But a mortgage, with possession and power of disposition in the mortgagor, is nothing at last but a reliance on the honesty of the mortgagor; and, in fact, is no security, as it is within the power of the mortgagor, at any moment, to defeat the mortgage lien by an entire disposition of the whole property covered by the mortgage. Such a mortgage, then, is no security, so far as the debtor is concerned, and is of no benefit except as a *ward* to keep off other creditors." "The very nature of a mortgage is to fasten a lien on specific property; and the courts have gone far enough when they have permitted an honest possession in the mortgagor. * * *

But in this case there is no specific lien, but a floating mortgage, which attaches, swells, and contracts as the stock in trade changes, increases, and diminishes; or may wholly expire by entire sale and disposition at the will of the mortgagor. Such a mortgage is no certain security upon specific property."

"In such case the whole right to dispose of the property to pay a debt depends upon the will of the debtor, not affected by the rights of the mortgagor; and what reason is there in permitting the will of the debtor to determine whether property shall legally go to pay a debt or not? If it be the will of the debtor to appropriate the mortgaged property to pay the debt, it is binding as against the mortgagee; but if it be not the will of the debtor, and the property is seized upon execution, the rights of the mortgagor fasten upon the property, and take it away from the execution creditor. Then the property is not held by the mortgage, but by the will of the debtor; because, if the debtor sees proper to dispose of it, he has the power under the mortgage. He may dispose of the property, defeat the mortgage, and put the money in his own pocket; but if he refuses to pay a debt, and you seize the property in execution against his will, the mortgage steps in and restores it to the debtor. The whole matter, then, appears to rest upon the option of the debtor, to appropriate the mortgaged property to the payment of his debts or not, and not upon the mortgage. No reasoning will change this result if a mortgagor retains possession and the full power of disposition over the mortgaged property."

"A mortgage upon a specific article, with possession and power of disposition left in the mortgagor, is in truth no mortgage at all; it is no certain lien. The power to hold possession and dispose of the property is inconsistent with the very nature of a mortgage. It, indeed, would not, perhaps, be going too far to say that such an instrument was a nullity."

"As to all the world except the parties themselves, such a mortgage will be held void as against the policy of the law."

The court dissented explicitly from the doctrine enunciated by Mr. Justice Story, in *Mitchell v. Winslow*, 2 Story, 630; and, referring to his suggestion, that though part of the goods should be lost to the creditor by sales, others might be substituted by consent, replied: "This is no answer, for it may be that others will *not* be substituted, and, if we look to experience, in all cases where a trader has felt himself bound

to mortgage his whole stock, it is not the usual result." The fallacy adopted by a class of theorists represented by Story and Lowell is then pointed out. "The whole error appears to be in regarding the word *stock* as a fixed thing which must always remain, the same as a horse which preserves his identity, although in process of time every particle composing him may be thrown off and renewed." "The error is in treating a *word* as a *thing*, mortgaging a word instead of a substance, and permitting the *substance* to be sold, while the mortgage attaches and remains fixed to the word."

The doctrine thus comprehensively stated remains the law in Ohio. *Freeman v. Rawson*, 5 Ohio St. 1, was another case where the agreement that the mortgagor should continue to sell the merchandise mortgaged, appeared *dichors* the instrument; but the lower court is sustained in its ruling that the instrument was equally fraudulent and void as if this arrangement had appeared on its face. The ruling in *Coburn v. Pickering*, as to a secret trust, is referred to and approved, and it is said: "The mortgage must be precisely what it purports and professes to be, and must operate an absolute surrender of the property for the security of the mortgagee." "What possible arrangement could be more directly inconsistent with the nature and purposes of the conveyance, or could more palpably secure to the mortgagor all the beneficial uses of the property, than the power to use and dispose of it for his own benefit? It is simply and plainly saying that, as between the parties, the mortgagor's enjoyment of and dominion over it shall be no less than before, while it is put beyond the reach of creditors."

In *Harman v. Abbey*, 7 Ohio St. 218, the mortgage provided nominally that the mortgagee should have possession, but only as against all other persons than the mortgagor, and the latter was to continue the business at retail; while no provision was made as to the proceeds of sales, except as to paying expenses. This arrangement, which merely expressed more plainly in terms what the court discovered lurking under the surface of the two last named cases, was, in accordance with the previous ruling, declared absolutely void in law.

In Minnesota a similar ruling was made as to mortgage on a stock of goods in trade, in the first reported case of *Chophard v. Bayard*, 4 Minn. 533. The doctrine of the New York cases was approved, and it was held that permission to the mortgagor to sell the goods is wholly inconsistent with the idea of *a security*, and leads the judicial mind irresistibly to the conclusion that the instrument was made for some other purpose.

This doctrine was followed in *Horton v. Williams*, 21 Minn. 187, a case of a mortgage on stock and farm produce, some of which the mortgagee had allowed the mortgagor to sell. The rule was laid down in this case, and also in *Gere v. Murray*, 6 Minn. 305, that the province of the jury is to find only the facts as to the acts or intent of the parties, and that the court is to declare whether such acts or intent are fraudulent, as a question of law. In case the intent of the parties be inconsistent with the idea of an honest *security*, "the law declares such intent fraudulent." Perhaps no case has enunciated these principles more clearly, and at the same time more tersely, than *Horton v. Williams*.

The last named case refers approvingly to the two Wisconsin cases of *Place v. Langworth*, 13 Wis. 629, and *Steinart v. Deuster*, 23 Wis. 136. The former of these is professedly based on *Collins v. Myers*, 16 Ohio, 547, the language of which is quoted and adopted. In this case the provision for sales was exhibited on the face of the mortgage. In *Steinart v. Deuster* it appeared to have been agreed on verbally between the parties. But the two cases were held to be not distinguishable in this particular. The duty of the court was recognized, so soon as the fact is conceded or established in the case, to expose the inherently vicious tendencies of such a transaction, and to rule upon it as fraudulent in law.

The Supreme Court of Connecticut gave emphatic approval to the same rule in *Bishop v. Warner*, 19 Conn. 460. Mortgages had been given upon the stock in trade of a carriage manufactory; there was a merely formal delivery of possession to the mortgagees, after which the mortgagors continued business with the goods as usual. The court found

that, "up to the time of the attachment, the mortgagors were carrying on an extensive manufacturing business with the mortgaged property; supplying their customers from day to day; selling the carriages as they were finished, and as they were able to find purchasers;" "generally, we are aware, professing to act as agents for those in whom it was claimed, for the time being, was the paper title to the property; but yet, in fact, acting without accountability to any one; paying their debts to other creditors with the mortgaged property, as if they were the undisputed owners." The vivid picture thus afforded of the necessary results of the transaction satisfied this intelligent court of the vice inherent in it, without the necessity of reference to cases adjudicated elsewhere. It had already been announced in *Pettibone v. Stevens*, 15 Conn. 26, and *Beers v. Botsford*, 13 Conn. 154, as the doctrine in this state, that when the facts of a case are ascertained, fraud then becomes a question of law from those facts; "*it is the judgment of the law on facts and intents.*"

In Illinois it was urged upon the consideration of the Supreme Court, in *Davis v. Ransom*, 18 Ills. 396, that the statute of that state allowing possession by the mortgagor of chattels for two years, in case the mortgage be recorded, had, as intimated by Lowell, J., in *Brett v. Carter*, met all the difficulties of Twyne's case, so as to validate the mortgage in question. But the court was not blind to the fact that possession and publicity were minor matters, compared with the reservation of a power of sale; and the difference was plainly pointed out. Said the court: "The statute contemplates the retaining of possession by the mortgagor of *chattels capable of description and identification* only, and the retaining of such possession for use and *custody*, and not for sale and disposition in the course of business and trade." This accords with the ruling in *Horton v. Williams*, *supra* (21 Minn. 191), that such statutes do not change the rules of the common law, but "merely add another to the grounds on which a mortgage of chattels shall be void." In *Davis v. Ransom* a stipulation on the face of the mortgage allowed the mortgagor to sell the goods in the usual course of trade,

with a proviso that the proceeds should be paid over to the secured creditors. The mortgagor had paid over certain of the proceeds to one of said creditors, and thus far had manifested an intent not fraudulent. Notwithstanding this, the inherent vice of the arrangement was relentlessly exposed by the court. "This instrument does not provide for possession *remaining* with the mortgagor within the meaning of the statute, but seeks, under cover of a mortgage, to enable the mortgagor, in defiance of his creditors, to retail goods according to the course of merchants, and is against the evident policy of the statute. In effect, this instrument is no less than an assignment or bill of sale of a stock of goods, reserving to the assignor the absolute dominion and power of disposition for the period of fifteen months, during which time it contemplates that the assignor shall, with the goods, carry on his business of store-keeping as by him theretofore followed; that what he should add to the stock should enure to, and become a part of, the assigned or mortgaged property; and that, for this period, the creditors of the assignor should be hindered in subjecting the property to the satisfaction of their legal demands. * * * The law gives no sanction to such arrangements, and, however well intended *in fact*, will hold them void as against creditors, as tending to encourage and sustain fraud, and to hinder creditors in the collection of their just demands."

Read v. Wilson, 22 Ills. 377, was a like case, with a like clause in the mortgage; but here the mortgagees had, in fact, taken possession under the mortgage before the contest arose; and the court held that they were protected by their possession under the circumstances of the case, without abandoning the principles settled in the former case.

In Barnet v. Fergus, 51 Ills. 352, the mortgage covered a "stock in trade" among other things, but did not on its face grant permission to the mortgagor to sell the goods; this permission appeared by evidence to have been given *aliunde*. The court re-affirmed its decisions that such an agreement on the face of the instrument amounted to "fraud in law;" and, as to the particular case, held that such permission granted

"would be such a perversion of the mortgage from its legitimate purposes as to withdraw from its protection, and place within the reach of other creditors, all the property which the mortgagee had thus permitted the mortgagor to *hold for sale* in the ordinary course of his business."

This court had previously decided, in *Ogden v. Stewart*, 29 Ills. 122, that in a case like *Barnet v. Fergus* all lien of the mortgage is lost by a sale of the goods, and that the vendee from the mortgagor acquires a title to them.

The Supreme Court of Missouri at first held that sales unaccompanied by possession, whether absolute or conditional in their terms, were in law fraudulent and void *per se*, independent of statutes respecting fraudulent conveyances, and independent of the intentions of the parties. *Rocheblave v. Potter*, 1 Mo. 561, *Foster v. Wallace*, 2 Mo. 231, *Sibly v. Hood*, 3 Mo. 290, *King v. Bailey*, 6 Mo. 575; these decisions extending over the period from 1825 to 1840. But in 1841 this rule was completely abandoned, and in *Shepherd v. Trigg*, 7 Mo. 151, *Ross v. Crutsinger*, 7 Mo. 245, and *King v. Bailey*, 8 Mo. 332, the contrary rule was established that possession left with the vendor raises no question of the fraud in law, but merely a question of fraud in fact, to be submitted to the jury. It is somewhat remarkable that *King v. Bailey*, in 6 Mo., appears to be the same case which is decided in a precisely opposite manner in 8 Mo. When this court, in 1848, was confronted with a case of a trust deed on a stock of goods in trade, it was at first evidently embarrassed by the prominence given in its earlier decisions above cited to the question of possession alone; and was led to sustain the transaction in question on the ground that no provision for sales by the grantor appeared on the face of the deed, notwithstanding the fact appeared that sales at retail were regularly made with the assent of the creditor. *Milburn v. Waugh*, 11 Mo. 369. But in subsequent cases in which the power of sale was reserved to the grantor on the face of the instrument, this was held fraudulent and void in law, being no question of fact to go to the jury, *Brooks v. Wimer*, 20 Mo. 503, *Martin v. Maddox*, 24 Mo. 575, *Martin*

v. Rice, 24 Mo. 581; even in case the instrument bound the grantors to apply the proceeds of sales to the replenishment of the stock, Walter v. Wimer, 24 Mo. 63; and, also where the vicious provision does not appear in terms on the face of the deed, but is necessarily implied from other provisions, as in Stanley v. Bunce, 27 Mo. 269, and Billingsley v. Bunce, 28 Mo. 547, where the deeds covered all the merchandise, which the grantor might "at any time within twelve months purchase for the purpose of renewing or replenishing said stock." This clause, it was held, necessarily implied that the grantor "should retain possession of his goods and proceed with his business as a merchant." These principles are reaffirmed in Armstrong v. Tuttle, 34 Mo. 432, and Lodge v. Samuels, 50 Mo. 204 (1872); and so stands the law in Missouri. It is true the supreme court of this state found itself, in State v. Tasker, 31 Mo. 445, and Voorhis v. Langsdorf, 31 Mo. 451, embarrassed in construing deeds that covered goods "which may be added from time to time to said stock," and "all things whatsoever now, or that may be hereafter, used, bought, or belong to the said party of the first part in the course of his usual trade or business;" and was singularly unable to find in these provisions an intent, necessarily implied, to reserve the power of sale in the usual course of business. So the instruments in these cases were upheld, while the principle governing the cases in 20, 24, and 27 Mo. was still recognized. But the court had in Reed v. Pelletier, 28 Mo. 177, recognized the rule that an agreement of the grantee to allow the grantor to continue selling the goods, could be established by very slight evidence, so as to defeat the conveyance; and in Hall v. Webb, 28 Mo. 413, Napton, J., who prepared the opinions in the two cases in 31 Mo., had expressly disavowed the authority of Judge Story's opinion in Mitchell v. Winslow, 2 Story, 639, and antagonized his views. And Lodge v. Samuels goes far to correct any aberrations that might be indicated by the opinions in the cases in 31 Mo. There the mortgage conveyed "the entire stock in the broom-making business lately owned by" the grantors, "consisting of all the broom-corn on hand, and all the brooms

and machinery," and left the grantors in possession. From these recitals the plain meaning was inferred that the grantors were to continue to manufacture and sell brooms; and the deed was declared fraudulent and void upon its face.

The Pennsylvania cases are in accord with those from other states already referred to. In *Welsh v. Bekey*, 1 Penn. 57, a mortgage of crops, under which the mortgagor was to retain possession and make sales, the mortgagee to have nothing but the proceeds of the sales, was held fraudulent. In *Clew v. Woods*, 5 S. & R. 275, a somewhat similar case, involving a tannery and the tanning business, including hides in vats, the possession of the mortgagor was held fraudulent under the authority of the English cases. Indeed, possession is in this state held to be the matter of principal consideration in cases of this class and all other instances of fraudulent conveyances.

Hower v. Geesaman, 17 S. & R. 251 (arising in 1828), is the most satisfactory authority upon the immediate question. There the assignor, under a general assignment for the benefit of creditors, carried on as usual his business as a tavern-keeper, and also his business as a hatter. The transaction was held fraudulent in law and void, the question devolving upon the court to settle as one of law purely. The later case of *McKibbin v. Martin*, 64 Penn. St. 352, exhibits the very pronounced views of the supreme court of this state upon the question. It is with manifest reluctance that a transfer of a hotel business under doubtful and suspicious circumstances is there allowed to stand, after a verdict of the jury that there was an actual and sufficient change and delivery of possession to the grantee. *Clew v. Woods* is declared to be the Magna Charta of Pennsylvania law on the subject; and legal or imputable fraud is thus defined: "Fraud in law consists in acts which, though not fraudulently intended, yet as their tendency is to defraud creditors, if they vest the property of the debtor in his grantee, are void for legal fraud, which is deemed tantamount to actual fraud, full evidence of fraud, and are fraudulent in themselves, the policy of the law making the acts illegal."

In Tennessee, early cases had applied a similar rule to

mortgages upon property consumable in the use, holding that the reservation of possession and use in such cases was necessarily a reservation for the benefit of the debtor, and therefore fraudulent; and those decisions were followed as authority in Alabama, Massachusetts, Missouri, Mississippi, and other states—in some of them being relied on as applying in principle to the cases of mortgages on stocks of goods. It, therefore, appears singular that, in respect to the latter class of cases, there should have been any doubt or vacillation exhibited in the Tennessee decisions. But the reservation to the use of the grantor by way of sale of the mortgaged goods has not always appeared as clear to the supreme court of this state as has the reservation, intrinsically no plainer, by way of use and consumption. In the first case which arose, *Galt v. Dibrell*, 10 Yerg. 155 (1836), it took but a few words to determine, without reference to authorities, that a reserved power of sale made such a mortgage fraudulent and void in law, though there was no fraud in fact. *Saunders v. Turberville*, 2 Hum. 272, tended to a contrary rule, though not decisive. There a sort of qualified joint-possession between the grantor and trustee was provided for; but, in fact, the grantor had possession and control for his own purposes and benefit, without regard to the deed of trust. The arrangement was sustained as a valid security on the ground that the debtor's offense in using the property for his own benefit was a slight one, and was committed without the knowledge or assent of the creditors secured by the deed of trust.

But in *Doyle v. Smith*, 1 Cold. 20, where the terms and circumstances of a general assignment for creditors, to a trustee who took possession, showed that the main object of the transaction was the continuance of the debtor's business, the plain intent to reserve a benefit to the latter was held sufficient to vitiate the entire transaction. The pendulum oscillated to the other extreme in *Hickman v. Perrin*, 6 Cold. 135, where the objections to a reserved power of sale were abandoned, and a mortgage on a stock of goods was sustained on the two grounds, drawn from the Michigan case of *Gay v. Bidwell*, 1st, that no creditors appeared with claims older

than the mortgage, and that subsequent creditors could not complain of the transaction (as if it were like a voluntary conveyance), and 2d, to hold that a merchant could not make such a mortgage without closing his doors would be to hold that no merchant could mortgage his stock. But under a new organization of the Supreme Court of Tennessee all these aberrations have been corrected in the case of *Tennessee National Bank v. Ebbert*, 2 South. Law Rev., 1st Series, 175, where the characteristics of such mortgages are freely and thoroughly examined, and the correct rule is laid down with such perspicuity as to give to this case a leading position on the subject. The peculiar views advanced in *Hickman v. Perrin* are expressly repudiated. It is said, "admitting that there was no specific intent to defraud any particular creditor, or no actual fraud in fact, yet here are such *facilities for fraud*, contracted for on the face of the deed, that it must be held as wanting in legal good faith, on the plain principle that every reasonable man is presumed to intend the probable consequences of his own acts; and, besides, there is clearly a benefit contracted for to the grantors on the face of the deed, and a prejudice to the rights of other creditors." "The rule we lay down in this case only requires that there be a *bona fide* and certain appropriation of the property for the benefit of a creditor; not a colorable one, in which the creditors have only a *contingent interest*, dependent on the good faith of the assignor, while the assignor himself has an equally certain interest secured to him."

This rule remains the law in Tennessee, having been applied in the later case of *Woodward v. Goodman*, 3 Cent. Law Jour. 43, to a somewhat different instrument, in which, however, the reservation for the grantor appeared in the provision allowing him to continue to use the property conveyed by deed in trust, while the trustee could not sell it, and the creditors could thus have, not the property, but only the profits derived from its use, subjected to their demands. Under the principles settled in *Doyle v. Smith* and *Bank v. Ebbert*, this trust deed was declared void on its face.

In addition to these numerous and decisive cases from the

courts of last resort in eleven different states, there are several cases arising in the Federal District Courts, in bankruptcy, in which mortgages of the class before described have been held invalid and fraudulent, not under the provisions of the bankrupt law, but under the general rules of the common law. *Smith v. Ely*, 10 B. R. 553, and *In re Cantrell*, 6 Ben. 482, in the U. S. courts in New York; *In re Manly*, 3 B. R. 75, 2 Bond, 261, from Ohio; *Smith v. McLean*, 10 B. R. 260, from Mississippi; and *In re Kahley*, 2 Biss. 383, 4 B. R. 124, are cases of this class. The opinions in several of these cases expose the tendencies of such fraudulent arrangements very forcibly, and they constitute a valuable addition to the literature of this subject.

Nor was the principle of law under discussion wholly unsupported by the authority of the Supreme Court of the United States, though Mr. Justice Davis, in *Robinson v. Elliott*, treated and discussed the question as a new one in that forum. In *Bank of Leavenworth v. Hunt*, 11 Wall. 391, it appeared by evidence *aliunde* that the mortgagors of a stock of goods in trade remained in possession and continued to sell the goods, with the assent of the mortgagee, until a certain time, when the balance remaining was transferred to the mortgagee under the mortgage. The question at issue was, whether this transfer, being made in view of and just prior to the bankruptcy of the mortgagor, was valid and effectual under the bankrupt law. The Supreme Court declined to assume it to be so in the face of the testimony, which showed the mortgage to be fraudulent and void, as against creditors, at common law, under the rule in *Wood v. Lowry*.

It is fortunate in some respects that when the Supreme Court of the United States was again called upon to examine and pass upon this question in *Robinson v. Elliott*, the case before it was one originating in Indiana; for in that state the law upon the subject of fraudulent intent was in so peculiar a condition as to necessitate a close analysis of the precise province of the court in dealing with the subject. *Jordan v. Tarver*, 3 Blackf. 309 (1833), held a mortgage of cattle and horses fraudulent where the grantor had retained possession,

and traded and trafficked with the stock, much after the manner of Twyne's case. The possession of the grantor was here held to be conclusively fraudulent as a matter of law. But in the case of *Watson v. Williams*, 4 Blackf. 26, which presented a question of possession merely, and where there was "no evidence that the mortgagor used, traded on, or treated the mortgaged goods as his own," the rule was deduced from all the English and American decisions that fraud, in all cases of mere possession, was a question of fact for the jury.

New Albany Ins. Co. v. Wilcoxsen, 21 Ind. 355, had gone far to approve the doctrine of the New York, Wisconsin, Ohio, and Minnesota cases. It sustained the finding of the lower court, that a provision in a mortgage upon a stock of goods in a manufacturing establishment, allowing the grantor to continue his business, was necessarily fraudulent and void as against creditors, and cited the advanced case of *Freeman v. Rawson*, 5 Ohio St. 1. But the legislature had engrafted upon the statute of frauds of Indiana a provision that the question of fraudulent intent should in all cases be deemed a question of fact. The counsel, seeking in *Robinson v. Elliott* to uphold the mortgage, cited *Maple v. Burnside*, 22 Ind. 139, where the jury had been told that if the mortgagor remained in possession of the property mortgaged, using and trading with it as owner, this would be a fraud; and the Supreme Court of Indiana held this to be in contravention of the statute and therefore erroneous. It was thus an important consideration before the Supreme Court of the United States whether all questions of fraud in law were not pretermitted by this statute, so far at least as concerned Indiana cases. It was urged that "constructive fraud" ceased to have any existence in Indiana, and that the courts had no right to entertain or express any opinion whatever upon the question of the fraudulent character of a conveyance which reserved upon its face the right to continue selling the goods in trade as heretofore. But the court held that the statute in question could have no reference to the power or duty of courts to pass upon questions of law. The Indiana case was

cited of *Janners v. Doe*, 9 Ind. 461, a case referring to lands, where it was considered that the statute in question was merely declaratory of the law, and that the question of fraudulent intent, which it referred to the jury, was only the *fact of such intent* in cases hinging upon the actual intent of the parties. It was well said in this case, "If the court determines that the legal effect of the instrument is to delay creditors, the instrument is rejected. There is no occasion to go into the question of intent, for that could not aid a void instrument. Intent will not control the plain legal effect of the terms of an instrument; and if that effect would be to delay creditors, any intent that the party might have had to the contrary would not help the matter." The United States Supreme Court takes the same view, and, recognizing its duty to declare the law in all cases of fraud, supplements the foregoing views with a clear illustration of that principle of fraudulent tendency in the transaction, and of that conduct to which the law conclusively imputes a fraudulent purpose, which are totally independent of any of the intentions of the actors.

The same distinction had been early taken in New York, in *Goodrich v. Downs*, 6 Hill, 438, and *Cunningham v. Freeborn*, 7 Wend. 436, viz.: that the question of fraudulent intent to be left to a jury was a wholly different question from that of fraud in law, which the courts are impelled to declare existing in any conveyance reserving a benefit to the assignor.

The Supreme Court of Alabama, after apparently assenting most cordially to this rule in *Wiswall v. Ticknor*, 6 Ala. 185, has subsequently given effect to the rule in a more qualified manner, surrounding it with certain technical questions; as, that insolvency of the debtor must intervene to make the transaction fraudulent, *Ticknor v. Wiswall*, 9 Ala. 309; *Constantine v. Twelves*, 29 Ala. 614; *King v. Kenan*, 38 Ala. 63; and that the instrument cannot be declared fraudulent upon its face as against creditors when it does not show upon its face that there are other creditors, 29 Ala. *supra*. But the facts calling for the application of the rule are given

much consideration (in connection with other circumstances) in *Johnson v. Thweatt*, 18 Ala. 745. In *Price v. Mazange*, 31 Ala. 710, affirming *Constantine v. Twelves*, the court animadverts with just severity upon the vicious features of such transactions among merchants, saying of the one in question that it "has not even the dubious merit of providing that the proceeds of sales to be made by Bostwick shall be paid over to the mortgagee." But the idea advanced in *Johnson v. Thweatt* is, that if the vicious features do not appear on the face of the instrument, the case is to turn upon the question of intent, which must be submitted to the jury.

The Mississippi courts have given but little attention to the evils resulting from allowing such mortgages to stand. One was upheld in *Summers v. Roos*, 42 Miss. 749, where the reservation of a power of sale, though not embodied in the deed of trust, appeared sufficiently from a collateral agreement and other extraneous circumstances. It was held that these were mere circumstances of fact, to be submitted to a jury, who should pass upon the question of fraudulent intent; the court disavowing any convictions on the subject. This case is substantially affirmed in *Hilliard v. Cagle*, 46 Miss. 309, a case arising under the same trust deed, which was, however, here held fraudulent and void on other grounds.

The Court of Appeals of Kentucky has in like manner been slow to apprehend the real merits of the question. In *Ross v. Wilson*, 7 Bush, 29, while the mortgage on a stock of goods in trade was held inoperative merely so far as concerned subsequently acquired goods, the question of the mortgagor's power of sale was looked at mainly as a question of possession, and no such fraud was discovered to be inherent in it as would suffice to avoid the sale, but only a badge of fraud, such as might operate to postpone the mortgagee to other creditors.

In Maine the question has not been thoroughly discussed. The earlier cases of *Melody v. Chandler*, 12 Me. 282, and *Abbott v. Goodwin*, 20 Me. 408, are scarcely in point, though mortgages on stocks of goods in trade, because there the mortgagor, though left in possession, was there only as the

agent of the mortgagees, to whose use and benefit all the proceeds of sales were expressly to be applied. "They secured to themselves the power to control the proceeds for the same purposes for which the goods were mortgaged." 20 Me. 411. It is, therefore, inaccurate to cite these cases as authorities on the precise question. Nor can *Stedman v. Vickery*, 42 Me. 132, be relied on as an authority, since it is a case arising under a trustee's disclosure. *Googins v. Gilmore*, 47 Me. 9, is in point. There the mortgage which allowed the mortgagor to remain in possession, with an understanding that he was to go on as before in control of the goods and his business, was supported, the jury having sustained it on the question of fraud in fact. The court followed the uniform practice in that state of submitting the question of fraud to the jury, a practice which the earliest cases show was adopted implicitly from the parent state of Massachusetts. How slight attention has been given in Maine to the vital question in these cases is evident from the curious case of *Chapin v. Cram*, 40 Me. 561, a contest between two successive mortgagees of a trader's stock of goods, over \$25 worth of goods added to the stock between the dates of the two mortgages, and as to which the later mortgagee prevailed over the prior.

Nor do the Massachusetts cases disclose a full and satisfactory investigation of the subject. The early cases of *Allen v. Smith*, 10 Mass. 308, and *Macomber v. Parker*, 14 Pick. 497, proceed upon the theory that the debtor remained in possession of the property merely as the agent of the mortgagee, who was to have all the benefit of sales made. *Shurtleff v. Willard*, 19 Pick. 202, and *Robbins v. Parker*, 3 Metc. 117, involved mortgages upon hay, grain, and farming produce, and were decided contrariwise, the latter holding, with *Somerville v. Horton*, 4 Yerg. 541, that such property was consumable in the use, and therefore the instrument was fraudulent, while the former had, in assenting to the principle, refused to apply it. *Codman v. Freeman*, 3 Cush. 306, which is often referred to as an authority in this connection, involved a mortgage on household furniture, which was not

perishable property, and the only sales allowed under it were by way of exchange of furniture, the new to be substituted for the old under the mortgage; but this was held valid as to the property actually covered by the mortgage at its date.

In *Briggs v. Parkman*, 2 Metc. 258, it was held that an agreement under a chattel mortgage on a stock of goods in trade, that the mortgagor should keep possession and continue to make sales in the ordinary course of business, applying the proceeds to his own use, was not fraudulent in law; that while it *tended* to prove a fraudulent intent, it might be explained consistently with fair dealing; and that if explanations of good intent were offered, they should be received and credited. The decision was rested wholly upon the question of a fraudulent intent. The court exhibited a total blindness to the vicious features pertaining to such an agreement, which were pressed upon their attention in the argument of counsel; holding that as the mortgagor had agreed not to make any large sales of the goods, the offense was a very *little* one.

This case was approved and affirmed in *Jones v. Huggeford*, 3 Metc. 515, where the contract was that the mortgagor should apply the proceeds of sales, first to the purchase and substitution of new goods, and afterwards to the payment of the mortgage debt. It was distinctly avowed as the Massachusetts doctrine that only fraud in fact or in the intent of the parties will suffice to vitiate such a transaction. As the courts of that state could thus have no opinions of their own on the subject of fraud, no difference could be discovered between this case and that of *Briggs v. Parkman*.

The question arose again in *Barnard v. Eaton*, 2 Cush. 294, where the mortgage was much like that in 3 Metc., but it was treated lightly in the Supreme Judicial Court and passed by without decision. Again, in *Cobb v. Farr*, 16 Gray, 597, the question arose under a mortgage providing that the proceeds of sales should be applied to the purchase and substitution of new goods; and the mortgage was sustained without comment, the court being evidently satisfied with the rulings announced in *Briggs v. Parkman* and *Jones v. Huggeford*.

So also in *Rowley v. Rice*, 11 Metc. 333, where the question arose under a mortgage which was expressed to cover all such goods as the mortgagor might put in to supply the place of those he should sell, the court confined its attention to the question of the validity of the mortgage as covering the after acquired property; the reservation of a power of sale was not considered as of any consequence.

In *Miller ads. Pancoast*, 5 Dutch. 250, the Supreme Court of New Jersey advised the inferior courts, substantially in conformity to the Massachusetts doctrine, that in case the mortgagee of a stock of goods permitted sales in the usual course of trade, this would be merely evidence of fraud to go to a jury.

The two cases in 7 Michigan Reports of *Oliver v. Eaton*, p. 108, and *Gay v. Bidwell*, p. 519, present the question very fairly, the understanding that the mortgagor should continue to make sales as usual appearing in each case on the face of the instrument. The burden of each case is that the statute in Michigan (as in Indiana) makes the question of fraudulent intent a question of fact, and not one of law. In one case the verdict of a jury in favor of the conveyance is upheld by reason of the statute, the rule which it provides being cordially approved. It is admitted that "where an instrument contains illegal provisions and such as are not reconcilable, on any possible hypothesis, with an honest or legal intent," the law declares it void (*Oliver v. Eaton*). But the case at bar was held to be without that rule. The other case arose in chancery, and the court was placed face to face with the question, "were then the facts such as to create a legal fraud, notwithstanding the actual good faith of the parties?" "Under the Michigan statute, no," says the court, because that was intended to leave all necessary inferences from facts to be drawn by the jury alone, notwithstanding it refers in its terms only to questions of "*fraudulent intent*." It is argued that because the facts of other debts and other creditors, and their assent or their security, must appear *dchors* the mortgage, therefore the court has no right to any opinion as to fraud, but the jury are "the sole arbiters under any theory." The criticism

is made that "no court has given any satisfactory reason why such a provision should necessarily vitiate a chattel mortgage." In short, we can only conclude that as well established as the doctrine of *Robinson v. Elliott* may be, the majority of the learned Supreme Bench of Michigan cannot see its propriety. One judge, however, dissented in *Gay v. Bidwell*, and would have applied the doctrine of *Griswold v. Sheldon* and *Collins v. Myers*.

A similar defect of judicial vision is manifest in Iowa. *Torbert v. Hayden*, 11 Iowa, 435, presented the question very fairly. It was a mortgage of a stock of goods to secure a debt running twelve months, the mortgagors continuing their usual sales with the assent of the mortgagee, and using the proceeds for their own benefit. At *nisi prius*, the New York and Ohio rule had been applied to the case. The supreme court admitted that this rule harmonized with the English common law, and was well sustained by American authority; but declined to apply it in Iowa, resting the case upon the question of possession alone, as regulated by the Iowa statute (similar to that of Illinois), requiring registration of the instrument, and making the same equivalent to a delivery of possession under it. Retention of possession is supposed to be the only circumstance that can make a mortgage of chattels fraudulent in law, and that rule the statute has completely abrogated in Iowa. No notice is apparently taken of the fact that even in case of an actual manual delivery, such delivery would be completely nullified by allowing the mortgagor to resume the potential control and disposition of the property. It is complacently declared that none of the pernicious results of these so-called mortgages, that were so vividly portrayed in the Ohio cases, could be possible in Iowa. The statute requiring registration has purified such transactions of all their fraudulent tendencies, and removed all facilities for fraud. But the explanations by the court of this purifying process are unsatisfactory, in the light of the adjudications to the contrary that have heretofore been referred to. "It is true," says the court, "that if the mortgagor is permitted to deal with the property as his own, the mortgage security is

not altogether safe or certain; much is necessarily left to the honesty and good faith of the debtor; but if this confidence is abused, it is the misfortune of the mortgagee, and furnishes no ground of complaint to other creditors. They are no worse off than they would have been if no mortgage had ever been executed. To them it can make no difference whether the mortgaged property is in the possession of the mortgagor or mortgagee."

The summary manner in which other creditors of the mortgagor, and their rights, are thus dismissed from consideration, is adhered to as the policy of Iowa, in *Wilhelmi v. Leonard*, 13 Iowa, 330, and *Hughes v. Cory*, 20 Iowa, 399.

These doubtful and dissenting opinions cannot, it is believed, avail to weaken the force of a rule which is, by a majority of the courts of the land, so well established and so generally assented to. As a result of all the cases, we have the detection and exposure, through the keen perceptions and clear explanations of the state judiciary, now supplemented in the deliverances of our highest tribunal, of the innate fraud that poisons all these fair-looking instruments purporting to be mortgages on stocks of goods in trade. The witnesses to the existence of this fraudulent tendency are numerous and unimpeachable. It has been shown that those courts which are agreed in a disbelief of this style of fraud are merely negative witnesses. They do not, they cannot, as a general rule, deny its existence entirely. They only say that if it exists they have not discovered it. We have the old case before us, of a great number of positive witnesses on one side, and a number of merely negative witnesses on the other. Does it not follow, under the rules of law, that even the Michigan, and Iowa, and Massachusetts courts, including Judge Lowell, are bound to acknowledge that fraud in law exists in all conveyances of the class referred to, upon the evidence of the highly respectable witnesses who testify that they have discovered it lurking there, and have exposed it? Possibly a belief in the existence of the vicious principle may aid the doubters hereafter in discovering it. The Copernican theory of the

solar system is unquestionably true, though there are many honest men who still believe the sun revolves around the earth.

Another result of these cases is to establish, as rules of law, that fraud in law is not deducible alone from expressions on the face of a disputed conveyance; that actual fraud does not consist alone in a fraudulent intent of the parties to such a conveyance; and that there is a broad intermediate ground between the two fields that all the courts have at these various times investigated, viz.: fraud in law and fraud in fact—where facts may appear, either by the verdict of a jury on disputed and conflicting evidence, or by the admissions of parties, and from which facts it is a simple judicial duty to declare fraud in law. There is nothing abnormal in this; nor ought it to be questioned, either at the bar or on the bench, because the deduction is logically and philosophically correct. Even under the old, strict theory that fraud in law could be predicated only of the matters apparent on the face of the instrument, the same principles were applied. The agreement set out in the writings was a *fact* of the case; the judgment of the law upon that fact was a necessarily fraudulent tendency, equivalent in all its far-reaching malevolence to a fraudulent intent in the minds of the parties. There is no difference in the process by which the legal fraud is ascertained in such cases as *Collins v. Myers*. The only essential difference is in the character of the evidence by which the facts are ascertained. It is no less a judicial duty to construe the agreement, whose proof rests in parol, than to construe the one in writing signed by the parties.

These rules of law have worked their way so slowly into our jurisprudence, and have been so imperfectly recognized in England, that they have escaped in great measure the observation of the text-writers. Mr. Roberts, the English writer on Fraudulent Conveyances, thought that proof of fraudulent intent was necessary to establish fraud in all cases arising under the statute, 13 Eliz., or following *Twyne's case*; and that *Edwards v. Harben* was a confusing case, as to the applicability of the last named statute, and that of 21 Jac. I,

on bankruptcy. Angell and Burrill, in their work on Assignments, have dwelt mainly upon the question of possession alone as the material one in all cases where the possession has been a matter for discussion. The last named writer has given much attention to the subject of reservations to the use of the grantor, but has not considered the class of reservations made by retaining possession with power of sale; while he has barely presented, but has not discussed at length, the distinction between fraud in law and fraudulent intent. Mr. Hilliard, in his work on Mortgages, has discussed some of the cases on this subject, which he has termed "somewhat variable and contradictory," apparently drawing the general inference that the reservation of the power of sale "renders the mortgage fraudulent and void" (vol. 2, 430). But in a recent review of the case of *Brett v. Carter*, 3 Cent. Law Jour. 359, this writer assumes that "the strong tendency of the law now is to treat the question of fraud as one of fact for the jury, and not of law for the court," concurring in this respect with Mr. May. Mr. Bump has appreciated, to some extent, the distinctive characteristics of this class of mortgages, and, in his work on Fraudulent Conveyances, has, under the head of "Possession," introduced the sub-titles of "Perishable Articles," "Possession with *Jus Disponendi*," and "Parol Power to Sell"—adding, in his second edition, another, "Possession with power to sell in Mortgages." He has shown, too, how immaterial it is whether the reservation of a power of sale be made in the instrument or agreed to outside of it. But he has still left the question in some confusion by his statements that "fraud upon creditors consists in *the intention* to prevent them from recovering their just debts," and that "there can be no fraud without a dishonest intent" (p. 19), followed by this, that "the existence of the fraudulent intent is not, however, always a question of fact; it is sometimes a question of law" (p. 22), and this, "it follows, therefore, that what constitutes fraud is a question of law; it is the *judgment of the law upon facts and intents*" (p. 26). This confusion is apparently the result of an attempt, as announced in the

author's preface, to deduce the law from conflicting authorities, and, at the same time, "to leave such conflict of authority without explanation."

The inherent vitality of the rule thus drawn from Twyne's case must be apparent to every unprejudiced mind. Another instance is here afforded of the adaptability of the English common law to nearly all the possible exigencies and demands of Anglo-Saxon civilization. This rule originated in a case which arose in a rural, pastoral community. But the strong legal sense of the English courts seized upon and proclaimed the true principle governing the case—a principle that has lived, and has established its right to live, and is to-day an element of the general law of personal property in this vast country, where its influence is felt, not only among agriculturists, but among traders, where commerce is the distinguishing feature of our national progress and development. With all the favor and tenderness exhibited toward our mercantile interests by the law of the land, it imperatively insists that American merchants must avoid and renounce the fraudulent tendencies, the reservations of personal benefit, the secret trusts, and the "facilities for fraud," which were found lurking in Twyne's case, and which are so essentially the perquisites of dishonesty alone that the honest and fair-minded cannot touch them without defilement.

JAMES O. PIERCE.

MEMPHIS.

VII. NOTES OF CURRENT EUROPEAN LAW.

(No. 4.)

No use has thus far been made in these notes of the legal monographs and other papers which form so large a part of the Current European Law. It is, indeed, almost impossible to give any fair representation of them in the limited space allotted to us. The number of legal periodicals published in Europe is very great, and their pages are filled, for the most part, with such essays as are here referred to.¹

A mere catalogue of their titles would exhaust our space and have little interest for our readers. A brief abstract of the most interesting was contemplated in the original design of these papers; but the difficulties, both of selection and execution, are enough to make the experiment a doubtful one—at least to him who is charged with the task. Even where the subjects discussed are of the same importance to American as to European lawyers, these difficulties are scarcely diminished. The difference of technical phraseology alone is sufficient to create an almost insuperable barrier between the great body of civilians and of common lawyers. The power of words over thought was never more strikingly illustrated than in the separation which words, and to a great extent words alone, have produced between these two systems, springing for the most part from the same roots, growing up under similar, or at least analagous, influences, and dealing with a subject matter essentially one and the same as human

¹ In Italy alone, as we learn from the *Archivio giuridico*, edited by Professor Gerafini, of Pisa (vol. xvi, pp. 165, 6), there are no less than thirty law periodicals: weekly, half-monthly, monthly, etc. The number in Germany and France is, of course, much larger, but we have no means of giving the actual count. Few of them, comparatively, are ever seen in the United States, even in our largest public libraries.

conduct, human rights, human obligations, and breaches of obligations must always be. Every American lawyer who has looked, ever so casually, into the writings of the civilians, must have been struck with the frequent re-appearance of those questions he had supposed peculiar to his own system, only disguised by a different mode of statement. The recognition of this truth is the first lesson in comparative jurisprudence. The second must be the attainment of some common classification, some common vocabulary, which will enable such questions to be discussed in terms alike intelligible to civil and common lawyers. As we have said in substance before, it is to humble practical work of this kind, not to elaborate theories and philosophical analyses, that we must look for the first advance of comparative jurisprudence.

This necessary preliminary process will be much easier in some divisions of the law than in others. Criminal law, always comparatively simple and untechnical, may very probably have its own vocabulary, in which the jurists of Europe and America can discuss all its problems with each other long before the same object is attained in the more difficult topics of property-law, or even of the law of civil status. International law, by its very nature, must be free from the technicalities of any single system; indeed, the chief obstacle in the way of a comprehensive theory of *private* international law lies in these very technicalities.² The international application of criminal law can already be discussed in a much more satisfactory manner than that of civil law for this very reason. A slight glance at one of the recent treatises upon the subject will convince the reader of the very great disparity between the two branches. No lawyer, however great his learning, could hope to present such a sketch of private international law in an *extempore* address to an audience of lawyers as that which Professor von Bar has

² For proof of this, if any were needed, it would be sufficient to point to the questions in regard to successions, discussed in the second article of the present series. Southern Law Review, April, 1876 (vol. 2, N. S. pp. 162-7).

recently delivered under like circumstances at Vienna, taking for his topic the recent legislation of European states upon criminal international law. The address is reported in one of the best legal periodicals of Germany,³ and we present a much condensed translation of the parts of it most interesting to American lawyers, not only for its intrinsic value, but as a fair specimen of the kind of legal literature to which this article is devoted. We are obliged to omit not only all the criticisms upon the text of foreign codes, but also many passages of general interest that could not well be severed from them.⁴

The ⁵ international application of criminal law is a question which, on the one hand, involves the first principles of that law, and, on the other, is made of peculiar practical interest by the circumstances of our time: when the means of natural intercourse are developed and multiplied to a degree so remarkable; when foreigners are allowed to acquire property without restraint, and to carry on business of every kind without hindrance. Considering the effect which many crimes produce beyond the bounds of the country in which they are committed, there seems to be much reason in the view which would overlook entirely all territorial limits in the punishment of crime.

³ Der Gerichtssaal, band xxviii, hefte 6, 7, pp. 440-54, 481-98.

⁴ Dr. Karl Ludwig von Bar was born in Hanover in 1836, studied law in Göttingen and Berlin, 1853-7, and, after passing through the usual employments of a young German jurist, became a privat-docent at Göttingen in 1863, and was called thence to a professorship at Rostock in 1866. In 1863 he accepted a like position at Breslau, where, we believe, he still remains. His writings have given him a European reputation, especially in the fields of criminal law, international law, and the law of procedure. His work on International, Private, and Criminal Law was published in 1862, and that on the Fundamental Principles of Criminal Law, in 1869. The article of which we give an abridged translation above is the stenographic report of an address delivered by him before the Juridical Society at Vienna on the 28th of March, 1876.

⁵ Our readers will understand that the remainder of this article, from this point, is a condensed translation of Prof. von Bar's language, and that where the first person is used, or the author's opinions mentioned, it is that eminent jurist, and not his translator, who speaks.

In ancient times the foreigner had no rights—no protection from the state or its law. Criminal law existed only as a principle of vengeance. Whoever injured the member of another state was exposed to the vengeance of the injured party, no matter where the act was committed. It was not the place, but the status of the injured party, that determined the punishment. Sometimes, indeed, the state or community to which the latter belonged might see cause to demand the delivery of the offender, or other satisfaction; still it was the injured party that fixed the measurement of that satisfaction. We find instances in the early history of Rome where Roman citizens were offered to other states in expiation of a wrong committed by them. It was not until a late period of the Empire that the criminal law of the state was held to apply to all who committed crimes within its territory.⁶

During the middle ages it is not easy to determine what the exact rule was, since it was affected by the various relationships of the German races to one another, and by the founding of the great Frank Empire of Charlemagne. In this the system of Personal Laws was recognized—every man was judged according to the law of his domicile; consequently what we now call international law appeared only under the form of a law of status—the various races composing the Empire constituted so many various estates or ranks of men. Whenever we find a criminal prosecution, in the modern sense of the word, it is the personal law of the offender, the law of his rank or his tribe, that determines the penalty. In questions of *wergeld*, on the other hand, it is the law of the injured party that fixes the price of the injury done him, by an evident analogy with the modern action for damages.

The dissolution of the Frank Empire into a number of more or less independent communities left behind it the

⁶ L. 3, D., de officio præsidis (xviii. 3). There is, however, no recorded instance of the delivery to any foreign power of a Roman citizen who had committed a crime against other Romans in the foreign territory.

conception of criminal law as essentially a single, universal system, based upon the divine justice, the various earthly governments having committed to them merely the duty of executing its commands.

There were, indeed, great actual differences in the laws of different countries, but writers and even judges of the period seem to have regarded these as merely variances in the application of the law, which did not affect its essential unity. The mediæval writers hardly seem to be conscious of the existence of such questions as now constitute the international criminal law, except when they treat of such local or police regulations as they could not help seeing to be of a purely positive nature. The binding force of these upon strangers within the territory was argued as a question of *quasi* contract; their obligation upon subjects outside of the territory was usually decided by that doctrine of personal, real, and mixed statutes, which played so great a part in international jurisprudence down to the last century.

But, with the disappearance of the belief in a divine criminal law, and the full development of the distinct sovereignty of the various European states, these mediæval doctrines disappeared also, and the question presented itself in direct shape: How far *must*, and how far *should*, the criminal law of any state be applied to the acts of foreigners within its borders, or of its own subjects abroad?

The English law, from a very early period, has steadily maintained the exclusive jurisdiction of each law within its own territory,⁷ or what we shall call the territorial principle.⁸

⁷ It may be doubted whether the common law has ever recognized, as an independent and binding principle, the doctrine that our courts have no jurisdiction of crimes or wrongs committed out of the territory. After the trial by jury in criminal cases was firmly fixed in English law, it resulted from the rules of *venue* that a foreign crime could not be tried within an English county. But the courts of admiralty, and that of the constable and marshal, always took cognizance of crimes committed abroad. Thus, where goods were stolen on the ocean and brought into England, the common-law judges *turned the offender over to the admiralty*, saying that the original taking was not an offence of which the common law taketh knowledge; and, by consequence, the bringing

The different theories of the international criminal law may be stated in the following order, proceeding from the less to the more comprehensive:

First in this order comes the *territorial* theory, according to which cognizance is taken of all crimes committed within the territory of the state, and of such crimes only. This is the theory of the law of England and of the United States.

Second, is a modification of the same theory by what may be termed the principle of *active personality*. This holds that the citizens of each state are, or at least may be, held responsible to the criminal law of that state while residing abroad.

Third, is a still further modification, to which may be given the name of the principle of *passive personality*. By this the criminal law of each state is further extended, so as to embrace also foreigners who commit a crime against the citizens of the state.

Finally, the theory of the so-called universal criminal law. By this a crime can be punished anywhere, since it is not merely an infraction of the law and order of a particular state, but an infraction of the law and order of human society.

Let us examine these theories one by one. The first, or exclusively territorial, principle holds, that inasmuch as every state has the right to punish the crimes committed within its boundaries, "therefore no state can claim the right to take cognizance of a crime committed beyond those boundaries." This is the ground taken by the English jurists and those of the United States. I cannot regard it as altogether sound. The advocates of the principle of personal responsibility do not propose to trespass on the jurisdiction of a foreign state, or to seize the criminal upon a foreign soil. It is only proposed to pass a sentence which shall be carried out if, either

them into a county could not make the same felony punishable by our law. Butler's case, 13 Coke, 53, 3 Inst. 113. (As to the subsequent history of this doctrine, see 1 Bishop, Crim. Law, § 109.) But Lord Ellenborough says (in *Rex v. Sawyer*, 1 C. & K. 101) that there is a writ known to the law of England, if subjects have suffered in their goods or persons in foreign parts. The reference here, no doubt, is to a civil action.

by chance or by extradition, the criminal is brought back within the jurisdiction. Moreover, the ground seems borrowed rather from private than from public law. No one doubts that if A has a claim against B, C cannot collect it without being thereto authorized by A. But the demand of the criminal law is simply that crime should receive its deserved punishment. The state cannot trust the enforcement of this punishment to a private citizen, or to any one who has no right to punish; but no reason can be seen why the state may not entrust it to another state of like powers and rights with itself, and in whose administration of justice it has confidence. There is still less reason for a refusal so to do, since a state has, for the most part, no pecuniary interest in the punishment of crime, but usually finds it a considerable source of expense.

Again, it cannot be regarded as an interference with the sovereignty of another independent state if we require our citizens residing in its territory to obey our own laws; so long as these laws require nothing inconsistent with the laws of the state in which they reside, both may exist side by side without conflict.

Furthermore, no state has ever yet been able to carry out the territorial theory consistently in all its logical consequences. The bond of citizenship is a permanent one. Every citizen owes, within certain limits, a permanent allegiance to his state, and this allegiance is under the sanction of its criminal laws. This is recognized by the English and American jurisprudence also; it punishes treason committed by citizens abroad, and gets rid of the inconsistency by a fiction⁸ that treason is not a local crime. Indeed, no state could long exist if it did otherwise, especially as any foreign state may find itself directly interested in abetting the treason of its citizens committed within the foreign territory.

⁸ The rule of English law here referred to by the author seems rather to be the effect of a positive statute (28 Hen. VIII, cap. 15) than of a fiction. See Coke's Third Institute, cap. 1, fo. 11, and cap. 49, fo. 111. That the general rule of English law on the subject undoubtedly is a result of the jury system is pointed out by J. F. Stephens. *General View of the Crim. Law*, p. 188.

But, beside this, there has been in England recently a gradual departure from the exclusive territorial theory in the case of great crimes, especially when committed beyond the pale of any, or of any civilized, government, or by the crews of English ships abroad.

If we cannot, then, confine our criminal jurisdiction within an exclusively territorial limit, it must follow that we have at least the right to take cognizance of the crimes of our own citizens abroad by what has already been termed the principle of active personality. Of course we cannot do this without limitation, since our citizens abroad live under different conditions from those at home.

But does the principle of passive personality follow also? Can we punish a foreigner who has committed a crime against one of our own citizens in a foreign state?

In support of the affirmative, it is said that the state owes protection to its citizens abroad, and that this protection must be given by means of the criminal law. But the protection the state gives to its citizens abroad belongs to the law of nations, not to its criminal law. We may demand that a foreign state protect our citizens within its territory by its own criminal law, just as it protects its own citizens. We may even use all the means which the law of nations supplies to compel the foreign state to meet this demand; but we cannot ourselves enforce the criminal law of the foreign state. But a more fundamental objection may be urged. Criminal law implies a crime, a breach of the law; and we cannot determine what conduct amounts to this until we know the law which is broken. Nothing but a breach of *law* can justify punishment. Hence there is a *petitio principii* in the very basis of the passive-personal principle. It may be more logically supported, as Ortolan supports it, under the form of a qualified universal criminal law. That is to say, the general principle is that crime may be punished alike all over the world, wherever it may be committed; but no particular state is called upon to punish it unless it affect or injure itself or some of its own citizens.

I come now to the last and most plausible theory—that of universal criminal law, which has been most forcibly advo-

cated of late by the Italian jurist, Paretti. It holds that crime is not made such by the sanction of the state; that the worst offences—at least those which have always been regarded as such—are *delicta juris gentium*. The state is merely the executioner of the punishment which it imposes. I should certainly be one of the last persons to base the right of punishing a crime on mere positive law, on the arbitrary will of the state. I consider it a fundamental principle that the law is not created by the state; that, to a certain extent, it is independent of the state; that the law exists before the state. But when the state comes to exist, it takes the law at once under its guardianship, and thenceforth the only positive law is that which the state enforces. In theory, no doubt, it is required that the state should not enforce a mere arbitrary law—that it should conform to the real nature of things; but what security is there for the state's constant fulfilment of this requisition? Criminal law, in particular, is now usually formed by legislation, and thus is exposed to many more chances of error than the instinctive development of customary law. We cannot even conceal from ourselves the fact that criminal legislation is often influenced by the conflicts of political parties, which may sometimes even affect the law of the most heinous crimes. It is a great mistake to assume that all states agree in their conception of even these crimes. Murder itself—and murder certainly belongs to the *delicta juris gentium*—is defined in the law of England and the United States otherwise than it is in ours.

So of the duel. In France its punishment at all is doubtful; in Germany, though one of the combatants is killed, our criminal code imposes only two years of imprisonment in a fortress; in England the sentence in such a case would be the same as for murder, whatever uncertainty there might be of its actual execution.

The general principles which underlie all legal science must also be taken into account in determining what the criminal law of a given nation really is; and very great differences arise from the different conceptions of these, as, for example, in regard to imputability, in regard to the right of

self-defence, etc. The question of murder or no murder may depend on the provisions of a particular law in regard to the citizen's right of resistance against illegal acts by an officer. In short, there is no such uniformity of the laws of different states, even in regard to the principal crimes, as this theory assumes to exert.

A universal criminal law, therefore, in an absolute sense, there cannot be. As its eloquent advocate, Paretti, acknowledges, the law of the place where a crime is committed must always and everywhere be admitted as a limiting principle; that is, other states cannot enforce their own laws in respect to such a crime if they are more severe than the *lex loci*. Such a limitation is just; but what would be its practical effect?

The application of a foreign criminal law is always a difficult process. Mistakes are easy, and the assertion that a mistake has been made, easier still. The judge has the difficult task of applying at once two laws—that of his own state and the (milder) one of the state where the act was committed. I would, therefore, prefer the simple mode of extradition.

The advocates of the universal criminal law say, indeed, that extradition must depend on the consent of the foreign state. But I can hardly believe that any civilized state would, at the present day, refuse to surrender a common criminal, on request, if it had the power to do so. It seems to me also a consideration of some weight that, in spite of the general confidence which civilized nations have in each other's administration of the law, distrust sometime arises, and that, especially in regard to the treatment of foreigners by local tribunals, distrust may very easily arise. The case of Müller, a German, accused of murder in England, may serve as an illustration. So may the charges of plunder and maltreatment when a vessel is wrecked upon a foreign coast.

We must be cautious in this matter, and not carry too far our reliance upon mutual confidence. We lawyers might, indeed, be more impartial and cool in our own judgment, but we cannot flatter ourselves that we always have the control of public opinion in such cases.

It results, then, from all that has thus far been said, that the true principle is the territorial one, united with the active-personality principle. The same conclusion may also be based on other premises. It may be said that criminal laws are to be enforced between nations so far as their enforcement does not conflict with other principles of international law, or with those of the criminal law itself. Any further application of them is necessarily false.

To apply our criminal laws in all cases to the acts of a foreigner on foreign soil, is to prescribe his conduct just so far as these laws differ from those of his own country. This is an infraction of that sovereignty which the law of nations recognizes. If the foreign country does not fulfil its obligations, we may appeal to that law; but we have no right to impose our laws upon its citizens individually.

Again, by such a pretension we impose upon the foreigner laws of which he has, and can have, no knowledge, and violate the important principle, *nulla pœna sine lege pœnali*. The practical meaning of this maxim, justly regarded as a palladium of civil liberty, is simply that no man should be held subject to a criminal law which it was impossible for him to know beforehand. There is no need of construing it to mean that the obligation of a penal law springs from the consent of the party to be bound by it.

The application of a criminal law to the acts of a foreigner abroad is, therefore, contrary to the principles alike of the criminal law itself and of the law of nations.

At the same time one point must be considered, on which the continental laws, at least, go to this extent. (The English and American law, in that respect, is not free from doubt, but I do not think it needful to discuss the difference at present.) The continental laws punish the acts of foreigners in a foreign country, when they are directed against the state itself, where law is in question, or its sovereignty. They do so because states do not fully protect each other's rights in these respects.

Even in the Roman law, as is well known, it was only the

majestas populi Romani, not the *majestas* of any other people, against which crimes were punished. The lack of a sufficient legal protection justifies, in such cases, the principle of revenge, or satisfaction by the act of the injured party himself, which we must consider to have been the leading principle of international criminal law among the ancients.

It may be remarked here that some regard this condition of the law as, in its nature, a transitory one, to be got rid of as soon as possible. They would have every state extend its own laws against treason, if possible, to cover offences of the same kind against other states. This may appear theoretically just, but it will not bear the test of actual practice. Such a judgment passed upon offences committed against a foreign state presupposes a judgment as to the legitimacy of the foreign government, and the lawfulness of its acts; a judgment which could hardly be expected or asked from a foreign court. A criminal prosecution conducted on such a principle might easily be perverted to the purposes of political persecution. Better an imperfect enforcement of the law than an ideal perfection which would bring with it so many difficulties. We must continue to treat the case as an exceptional one, in which the injured state takes jurisdiction by the law of necessity and self-preservation. Even thus regarded, it is a dangerous one. The strict application of the law of treason to subjects of a foreign state may easily work injustice, since the same act which, in a citizen, would be shameful treason, may, when committed by a foreigner abroad, be an act of patriotism.

I have thus far treated the general question of jurisdiction over offences only. There are many special questions of no little difficulty connected with the subject, of which I can only mention two or three of the most important.

Suppose a criminal act is committed in one place, while its effect is experienced in another: is the *lex loci actus*, in the strict sense of the law of the place where the result is felt, to be applied?

The English and American law holds the latter doctrine,

judging the case by the result by which, indeed, the crime, in a legal sense, is first completed.⁹ I venture, however, to judge differently, that the law of the place where the act is committed must be decisive.

To apply the law of the place of consummation is nothing more nor less than the partial application of the passive-personal principle. It is based on the domicile of the party who is, or who claims to be, injured; and the laws of the two places may differ on this very point, whether the act is a legal injury. All the reasons, therefore, alleged against the passive principle are reasons against deciding the case by the law of the place of consummation.

The chief importance of the question is not in the cases where the act is unquestionably a criminal one by both laws, as in the oft-mentioned instance of a shot, fired by one person standing in the territory of A, killing another in the territory of B. But when the act is lawful by the laws of A, and unlawful by those of B, we come again in conflict with the maxim, *nulla pœna sine lege pœnali*.

Nor is it always easy to say where the effect of an action takes place. For instance, an insolvent debtor is robbed by his cashier. He himself has no interest in the matter, for he has no expectation of saving anything for himself from the fund. His creditors, who dwell in other lands, suffer the loss. This simple instance will show how undefined the place of the effect of a crime is, and how impracticable it is to determine thereby the competence of a court.

Where, again, is the effect of a libel, or such injury, committed by means of the press? It is everywhere—it is nowhere; and if we were to prosecute the offence in the place of its effect, it would lead to a multiplication of jurisdictions even more dangerous in international law than it is in a single land.

A second question of importance is, whether the prosecution of a crime committed abroad—supposing it to be one that, on general principles, should be punished at home, as

⁹ See *U. S. v. Davis*, 2 Sumner, 482, and other cases collected in 1 Bishop, *Crim. Law*, § 80.

the crime of a citizen abroad—should depend on particular conditions; especially, whether the authorities should wait for a complaint by the party injured, or for any request of the foreign power on whose territory the crime was committed?

In such cases a certain discretionary power must be committed to the authorities. In point of fact, great weight must often be attached to the circumstance of a complaint by the injured party; but it would be wrong to make such a complaint an indispensable requisite. When such a complaint is required in criminal cases, it is usually done on account of the particular *private* interest which the injured party may have in the matter, owing to the peculiar nature of the crime; but in foreign crimes this private interest cannot be considered. The decision, to prosecute or not, must often depend on the amount of trouble and expense which may be looked for in the particular case, and on the general principle of international criminal law, that minor offences committed abroad need not be noticed. On the other hand, it would be absurd to take private interests into account in the prosecution of the more atrocious crimes. Suppose a murder committed by a German abroad, who takes refuge on German soil. By a rule, acknowledged throughout Europe, being a citizen, he cannot be delivered up for trial abroad. Should the German tribunal be left powerless, if no private accuser appeared? As little should we bind ourselves to wait, in all cases, for a request from the foreign authorities of the place where the crime was committed, in cases where, on general principles, we have criminal jurisdiction. We have that jurisdiction, wherever we have it at all, for our own behoof. An exception may, perhaps, be made to this of some special kinds of offence, and particularly of political offences.

A third question is, what effect shall be attributed to the judgments and other acts of foreign courts?

A punishment undergone abroad must be taken into account, I think, as a fact, everywhere and under all circumstances. The criminal must not suffer double punishment

because the states are not agreed who has the right to punish him. Even if one state claims this right unconditioned and absolute, as in the case of offences directly against the state, it must at least make an allowance for the punishment already suffered. In other cases it will often be expedient, in order to avoid the perplexing and often petty task of weighing one punishment against another, to be satisfied with the foreign punishment, once fully endured, as a complete expiation of the offence at home.

Next, how about acquittals? Are these also to be recognized as binding abroad? If we were only to follow a rigid, juridical logic, some nice distinctions would be required here as between acquittals merely for lack of proof, and acquittals on the ground that the facts proved do not constitute a crime. But in discussing a rule to be fixed by legislation, and taking into account the hardship which a criminal prosecution may inflict even on an acquitted defendant, and also the desirableness of showing all possible respect from the tribunals of one nation to those of another, I think the better rule is to recognize all foreign acquittals simple and without qualification, except in respect to crimes of which a state claims the exclusive cognizance—such as those against its own sovereignty; since the latter are, even in theory, differently treated in foreign states.

The effect of a foreign pardon and of foreign laws of limitation should also be considered in this connection.

(In conclusion, Dr. von Bar discusses two recent cases of particular interest in international criminal law. The first is that of the Bremerhaven explosion. Want of space compels us to omit his discussion of this, as we have already been obliged to omit the very full and interesting comments on the recent criminal legislation of the chief European states, which form the larger part of his article. The second case, however, has a special claim on our notice, since it is the same of which we give an extended account in the last number of these notes—the case of the Princess Bibesco.¹⁰

No private litigation for years has awakened so much

¹⁰ Southern Law Review, October, 1876 (vol. 2, N. S. p. 533).

interest among the most distinguished European jurists, and those of our readers who have studied in the former article the opinions of Bluntschli, von Holtzendorff, and others, will be glad to learn that of so eminent a jurist as Professor von Bar.)

This case is a good illustration of the fact that the practical difficulties found in the international application of criminal law very often spring from preliminary questions of a civil nature—questions belonging to the *private* international law.

A French lady (the Princesse de Bauffremont, now Princesse de Bibesco) obtained in the French courts a judgment of permanent separation from her husband, the Prince de Bauffremont. She betakes herself to Germany, obtains naturalization in one of the smaller German states, and takes advantage of the Civil Marriage Act (1874) of Prussia—now superseded by the law of the Empire on the same subject—to contract a marriage in Berlin with a second husband, the Prince de Bibesco; the French law recognizing no divorce, and, therefore, not allowing any second marriage after a *separation de corps*. There ensued at once a civil action in France for the return of the children of the first marriage, who had remained in her custody. The French lawyers of the first husband took the ground that she had committed a bigamy, and was liable to prosecution and imprisonment therefor if she returned to France.

The question, in fine, is this: Could this lady change her nationality without the consent of her husband? The great majority of the French jurists appear to deny her this power, under the French law, in spite of the separation.

It was also asserted that a provision of the German law had been broken by the German naturalization; but on this point we need not here touch. It would raise an exceedingly difficult question, namely: Supposing a breach of law to have taken place, how far will it avoid an administrative act? Or, in the actual case: Is the naturalization valid, even though the proper official may have overlooked or misconstrued a provision of the law of the German Empire in respect to the acquisition of citizenship there by naturalization in one of the confederated German states?

We may assume, then, as is really my opinion, that the naturalization was valid by the German law; and we may assume, also, that it was not allowed by the French law.

In such a conflict of laws I think the principle of free emigration must decide; and, according to this, the law of the new country prevails over the law of the country which the party has in fact abandoned. This general principle is substantially the basis of the recent treaties contracted by the United States of America with most of the great powers of Europe, and particularly with the German Empire, with Austria, with England, etc. These treaties provide that, if an emigrant to the United States has become a citizen there, he is thereby freed from all obligations to the state which he has left, and especially from the obligation to military service there. The only exception is in case of a return to his former home within a brief space (five years), so that the whole transaction can be regarded as a device to evade its law.

The same principle of free emigration is also recognized in the jurisprudence of the American states with reference to this very question of divorce. The wife may obtain a divorce even though she is entitled to it only by the law of her new domicile.¹¹

One remark only in conclusion. There is a strong movement at the present day in favor of the reduction of all international law to a definite statutory form. I will not attempt to decide on its merits, or how far we may apply to this movement, as to similar movements, for the codification of the law of single states, the saying, "The letter killeth!" But I may say that if we desire to see improvement in international law generally, and in criminal and private international law

¹¹ It should be remarked here that this doctrine is not universally accepted by our American courts, though the weight of authority is undoubtedly in its favor. See *Colvin v. Reed*, 55 Pa. St. 375; *Reed v. Elder*, 62 Pa. St. 308; *Bishop on Marriage and Divorce*, vol. 2, §§ 128, 163, 173, 177; *Cheever v. Wilson*, 9 Wall. 108. Some remarks on the subject, and on the doctrine of *Colvin v. Reed*, by the author of this note, may be found in 2 *Western Jurist* (1868), 236-9.

particularly, we must be on our guard against Utopian ideas. We must base our efforts in this direction on the independence and sovereignty of the individual states.

WM. G. HAMMOND.

IOWA CITY.

VII. BOOK REVIEWS.

THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES. By DR. H. VON HOLST, Professor at the University of Freiburg. Translated from the German by JOHN J. LALOR and ALFRED B. MASON. 1750-1833. State Sovereignty and Slavery. Chicago: Callaghan & Company. 1876.

It is probable that this work will attract a much larger share of attention than it would have received if it had been written by a citizen of our own country. But this circumstance will neither add to, nor detract from, its real merits.

We naturally suspect that our own writers on political subjects relating to our country will not be found to possess that judicial calmness best suited to the weighing of questions that have been long and bitterly contested. Something of the heat of debate will be found to survive in the decision which assumes to close the controversy. On the other hand, the opinion of authors of one country concerning the affairs of another have been likened, for their disinterestedness, to the impartial voice of posterity. Though they may be fuller of errors, yet there is a faint trust that they will be less warped by passion than opinions formed where the contest is one of daily practical importance. It would be pleasant to think that the foreigner, separated from us by an intervening ocean, would regard us with something like the same composure with which an astronomer surveys the mountains and valleys of the distant moon. But the whole world is too much akin to justify the hope that such will be the case. Local questions depend on general questions that have a very wide application. These general questions, always discussed, are never decided. The most carefully elaborated theories meet, in their practical operation, with such unexpected hinderances as suffice to open up the whole discussion anew. Men are partisans by nature; they become most passionately moved concerning matters of which they cannot possibly have any knowledge; they forget their own children in the absorbing interest which they take in Borrioboola Gha. If they lay over a matter for further consideration,

they establish a provisional opinion, in order to lay asleep the uneasy feeling of doubt ; and after that, indolence, bias or a pride of consistency, prevents them from changing their minds. The soldier engaged in actual battle possesses a certain moderation which is unknown to the Richelieu or Philip II who directs the operations of war from a closet. Prejudices uncompromising and implacable invade the chambers of the lonely student. The prisoner of M. de Saintine could not see the sentinels that passed along the side of his prison ; but he could see their shadows thrown on the opposite wall ; and from the motions and appearances of these shadows, he came to hate some of the sentinels, to love others. Had he been placed in the company of the men themselves, doubtless his judgments might have been speedily reversed ; but they would have been still exceedingly fallible : for he would still have seen mere semblances and shadows, and these he would still have regarded from a dark prison house, infested with strange and grotesque shadows of its own. In any event he had, and would have had, deliberate convictions, the staple of the dogmatic conclusions of the historian, who knows all, and would have foreseen all, if he had chanced to live a little earlier.

Some have thought that the style of a book is more important than its matter. As to all subjects of eager debate, it is perhaps of more importance to know the frame of mind with which an author approaches them, than to know what he says of them. Any one can chop logic, or gloss over facts, but it is to the unimpassioned, the patient, the disinterested enquirer that truth is like to give up her mysteries. Whither it is more probable that we shall find these qualities in one who writes of us from some remote spot, is, on the whole, uncertain. The effort and enterprise of writing a book heats the average brain. To things of daily experience we grow indifferent. We are less excited about them than one who merely reads of them in a book. The law proceeds on opposite theories, and arrives at no satisfactory result. It takes at first jurors from the vicinage, as knowing all the facts : it then takes those that live some way off, and know nothing of them, as being more unprejudiced ; though one is more apt to act on a momentary impulse on the first statement of facts than at any time afterwards. Neither rule has any tolerable guaranty to recommend it, and both rules are based on rough and uncertain approximations.

The hopelessness of any rule for getting an impassive account or judgment of anything pertaining to human affairs will probably

occur to most readers of the present work, which flames out with all the violent declamation that usually animates the political pamphleteer, to whom instantaneous favor and speedy oblivion are of nearly equal importance. Our author might have done a valuable service by simply stating old facts in a new and impartial light; but he has only striven to open old controversies by infusing into them new bitterness, the unhealthy product, apparently, of a secluded intellectual fermentation. He starts out with a system which he is bound at all hazards to maintain. That manner of writing history has been not a little overdone; one could wish that it were a little out of date. Sir James Macintosh said: "The reign of system seems progressively to shorten in proportion as reason is cultivated and knowledge advances." According to the views of our author, there is only one system of government that deserves approbation; and this is that of a strongly centralized government. The people of this country, he tells us, have fallen down in blind worship of the Constitution of the United States, have made it a political fetich, esteeming it as a good model of government not only for themselves, but for all the nations of the earth. This disposition he strongly condemns. One might suppose that the ground of the condemnation would be that different nations require different forms of government. But with a confidence equal to that ascribed to the people of this country, the writer commends to the reader the model of the Prussian government as suitable for universal adoption. But if the Prussian government needs any improvement, clearly, according to the writer's theories, it would be in giving it a stronger centralization, something like that which it possessed in the last century, when the king of Prussia put the bosom friend of his son to death in the presence of that son, in order to excite in the heir apparent a warmer devotion to evangelical religion.

Situated as our author is, perfect fairness and good faith would constitute almost the only peculiar value that would be possible for the work before us. That he should discover anything new in our government, or in our theories of government, is beyond the region of rational hope. It is not of very good omen that he starts out with the assertion that "the history of the United States, even as far back as the colonial period, is unusually simple, and the course of their development consistent in a remarkable degree." We naturally distrust one who professes to settle inveterate and interminable disputes by a few easy theories. This is only a labor-saving

method. The infinite number of small things which make up the life of a nation, and which determine its destiny, are conveniently ignored. After all, it is the dust of the balance that turns the scale. When important and numerous factors are left out of the problem, only a nominal and easy conclusion is reached; and the real task is no nearer done than it was at first. But herein is a sort of prudence; for if we state all the objections and difficulties that oppose our theories, it may chance that the reader may think that we have not answered them; and this, according to Shaftesbury, is the common fate of those who would be fair authors. Our author has taken a bond against such a fate. He has undertaken to make not only a convincing argument, but one that shall be conclusive; to close cycles of dispute with decisive words. But no conclusive argument can ever be made if it takes in all the premises: there are a thousand hooks on which doubt may be hung, a thousand crevices in which the lance of the enemy may find a lodgment; though dogmatism may think to conceal its defects by affecting to be blind.

Nor is it a very good sign that the author begins by decrying De Tocqueville as a "superficial writer." To do this when treating of the same subject with De Tocqueville demands a good deal of self confidence. The name of De Tocqueville has been thought to be a very respectable one in the world of letters. Considering his life of severe labor, it may be said that he wrote but little, and he published only a small part of that. Somewhere he says that he worked hard sometimes for many months without writing a full page of his "Ancient Régime." His works on America were written with the utmost deliberation and circumspection. A small volume might be made up of encomiums passed upon them by men of the highest distinction, of different countries and of opposite views. It has gone through sixteen editions in France. It has been translated into every language of Europe. In England and America it has been often republished, and has been popular even in the translation of Reeve, the heaviest and most lumbering translation ever made of anything. And everywhere the work is still in constant demand. Such is the Philistine that Dr. Von Holst is appointed to slay.

There is a reason for the hostility. De Tocqueville, an aristocrat by birth and instinct, beholding the march of democracy "with a sort of religious terror," divesting himself of every trace of passion, forces his thoughts into an unruffled current that faithfully reflects every object, while the thoughts of our author are so broken by

passion as to reflect nothing clearly. De Tocqueville perceived, not without an agreeable sentiment of admiration, that power in the United States is so diffused as to make liberty a natural and perennial product, as it were, of the soil itself. On the other hand, Von Holst sees in this same diffusion of power only a hinderance and obstruction of the functions of the general government. That the Federal government should not be omnipotent in all things is to him a crude anomaly. In no very reverent spirit he says that the fathers of the republic, who stood up for a partition of power between the states and the general government, "ventured to out-do the mystery of the Trinity, by endeavoring to make thirteen one, while leaving one thirteen." Yet it is intelligible to most persons that the Federal government should be endowed with certain definite general powers, referring to the interests of the country at large, while matters of purely local concern should be left to the different states. The theory may be bad; it may be difficult to perceive the exact equilibrium which it demands, but it cannot be disposed of summarily as being something transcending human conception. It has found a place in many other governments; and where the theory is not, the practice extensively prevails; for even the most centralized government habitually establishes local bureaux or subordinate centres of administration, which practically possess a certain degree of independence.

The author supports his views throughout in a manner that hardly does justice to the intelligence of the average reader. Of this manner we have just mentioned one example. Out of mere regard for space, we shall only mention four others in order to show the methods of a writer compared with whom De Tocqueville is assumed to be superficial.

1. He contends that the states are in all things subservient and subordinate to the Federal government, because they were not states until the establishment of the latter: they were colonies. But certainly the communities were the same notwithstanding the change of name; and the fallacy is a merely verbal one, which any school-boy during his second week in logic would detect.

2. The submission of the Articles of Confederation to the legislatures of the several states is not deemed by him a circumstance favorable to his argument. His manner of getting rid of the fact is characteristic. He says, in short, that the Congress was a revolutionary body, and hence all of its acts were illegal. But the legislatures of the states were legally constituted under British law; there-

fore they could not act on a proposition at war with the principles on which they were established. Hence the submission to the legislatures was a mere blunder, and had no significance. We do not pretend seriously to comprehend how an illegal act of a legal body should, in times of a revolution, be of less consequence than the illegal act of an illegal body; but any way, it was the illegal body that made the submission. When it comes to the submission of the Constitution of the United States to the state legislatures, the author prudently passes the subject over in silence.

3. The author asserts that, after the adoption of the Federal constitution, those who had been most opposed to it made the most frequent appeals to its provisions. This he complains of as a wretched perversity and gross inconsistency. Yet the Federal constitution was a grant of power. Those who opposed it did so on the ground that the grant of power was excessive. It was therefore perfectly natural and perfectly consistent that they should be the first to object to the exercise of that power, and to refer to the constitution as defining the character and extent of the grant.

4. Let us turn to a matter of a little different kind. After the Revolution, American commerce did not flourish. The reason was not far to seek. Commerce is not built up in a day. The country was exhausted by the war, and its resources were but poorly developed. Passing by these obvious causes, and returning to his perpetual theme, the author says that the cause of the depression was the want of a strongly centralized government to make treaties of commerce on which other nations could securely rely, as if treaties of commerce could make commerce, or as if commerce always flourished under despotism.

It would be easy to adduce a hundred specimens of this kind of begging of the question.

The author is no less peremptory as to men than as to measures. He falls into the vulgar error of confounding morals with abstract theories; and he condemns whoever differs with him as to principles of government as a knave and a demagogue. He has a very poor opinion of the constitution of the United States, though he is at but little pains to analyze its structure. Of the Declaration of Independence he thinks still more unfavorably. It was "a peculiarly bold fancy." It was suited "to sap the foundation of all things, to lay down arbitrary principles as unquestionable truths, which would willingly have, in a night, overturned the state and the established order of society, to make them accord with the

ideas which they were wont to call 'natural rights.' " But it is for the author of the Declaration of Independence that all the wells of bitterness are exhausted. Von Holst knows no moderation in either praise or blame. The following is an estimate of the character of Jefferson :

"As he, partly from interest and partly because misled by his idealistic reveries, concealed his ambition under the mask of the greatest simplicity, stoical indifference, and even disinclination to accept any political honor or dignity, so, too, his conscience was not precisely what would be called tender in the weighing and measuring of words, whether his own or those of others. Such a character could scarcely always resist the temptation to make ink and paper say what, in his opinion, they ought to say. His mode of thought, which was a mixture of about equal parts of dialectical acuteness and of the fanaticism of superficiality, as short-sighted as it was daring, made this a matter of more difficulty. Hence it is that not the slightest weight should be attached *a priori* to his interpretation of the constitution."

There is much more of the same sort. This happens to recall the comments of De Quincy on a couplet of Savage Landor :

" 'A roar ! what wretch that nearest us ? what wretch
Is that, with eyebrows white and slanting brow ?'

But what, then, were the 'wretch's' crimes? The white eyebrows I confess to; those were certainly crimes of considerable magnitude; but what else?"

It is not that Jefferson was not a kind and affectionate husband and father, a sympathetic friend, a dispenser of a generous hospitality, honest in all his dealings, a man of vast and varied attainments, a most instructive and entertaining companion, taking his place easily everywhere with the foremost men of his time; but he had incorrect theories of government; and therefore he was a bad man. This vicious circle of reasoning has formed the ground of all religious and political persecution. But the author must simplify character just as he simplifies history; and to suppose a man as having erroneous views without being totally depraved, would be to render investigation too complicated. There is no perspective, no shading of colors, no neutral tints: the pictures are in staring white and black. Men naturally exaggerate, and language partakes of our infirmities of thought. We have many words to express every extreme of good and evil, though we rarely

find proper objects to which to apply them. Passion, however, which has no time to think, needs a copious vocabulary, lest it might not find a word at all; but when men write history they have time to select their phrases for the expression of truth, whose shy limitations seem to exile it from the dogmatic forms of common speech, which has few or no single words or epithets to describe man, for instance, just as he is, neither supremely good nor hopelessly bad. But this delicate art of painting the exact truth, so that it may appear just as it is, neither violent nor tame, compounded, as it usually is, of many simples, is a thing which the author leaves for "superficial" writers. Instead of a careful study of the government of the United States, he gives us invective; instead of a nice discrimination of individual character, he gives us epithets; and yet, with a strange inconsistency, he continually warns the reader against the partisan tendency of American writers. In his preface he expresses an apprehension that he may not be thought to "feel" with the Americans; but we cannot lay that fault to his charge. His book reads so much like the production of many of our "thoughtful statesmen," that it would almost seem as if he had purposely copied their style. The publishers promise us two more volumes of the same kind. A fierce diatribe running through three volumes will afford a tolerable test of the perseverance of the reader. The text of the whole discourse is contained in the last line of the present volume. It is a quotation from Bismarck: "Sovereignty can only be a unit, and it must remain a unit,—the sovereignty of law." The last four words appear to be superfluous. According to this view, the whole American government is based on a delusion and a crime; for the Revolution was a war for local government, and King George and Lord North used much the same language as Bismarck. The deformity of our government is therefore congenital, and is probably incurable.

But, on the whole, the most valid objection to the book is its title. The name "Constitutional History" is imposing, and in this instance is unfair. The work is written for those who feel, but is addressed to those who think. A passionate review of the dead issues of the operation of our government might find a class of readers to whom it would be acceptable; but without extrinsic aid they would hardly turn to the present treatise. On the other hand, many will take it up in the hope of finding a calm and considerate examination of the principles upon which our government is founded; and they will lay it down with a sense of disappointment,

an impression that they have been cheated and deceived. Men have a perfect right to get up books of this kind, though their utility may be questioned ; but there is at least an obligation on them to give proper names to their wares. As nearly everything relating to the past goes under the name of history, this work may pass for something of that kind ; and if a history, it is doubtless a political history. But a constitutional history it is not. Everything that the author has to say of the constitution is in the vein of a shrill Phillipic. It is to him simply ambiguous, temporizing, weak and vague. Of the great body of judicial decisions that have defined its language, he seems to know nothing. The constitutional history of the United States remains to be written ; and whoever shall conscientiously undertake the task, after many years of patient discipline, as we may trust, will derive but little aid from the present work. He will only see how dialectics have been perverted, how serious questions have been obscured by feverish declamation. He may, however, find it of some value in teaching him what to avoid.

We have had no opportunity of comparing the translation with the original. The English, at least, is very good. The paper and type of the volume are excellent ; but the orthography is in the lowest style of the art. R.

UNITED STATES REPORTS, SUPREME COURT, Vol. 91. Cases Argued and Adjudged in the Supreme Court of the United States. October Term, 1875. Reported by WILLIAM T. OTTO. Vol. 1. Boston : Little, Brown, & Co. 1876.

Mr. Otto's first volume exhibits a modesty which furnishes him a most favorable introduction to a book-ridden profession. His accession to the high distinction of reporter of the decisions of our highest court was attended with no flourish of trumpets. The volume before us has been merely announced through the press ; and it appears now without parade and bearing on its pages no words of formal introduction, or of dedication to any distinguished individual ; and so far as these circumstances speak, they seem to say that these reports are submitted, to be judged according to their merits. If they are found to be meritorious in any degree, Mr. Otto need expect from the profession only words of encouragement and commendation.

This volume does not present all the decisions made at the Oc-



tober term, 1875, of the Supreme Court. Indeed, one legal journal alone claims to have published fifty of the opinions filed at that term, which are not included in this volume. It would probably be impracticable to embody all the decisions of one term of this overworked court, with its docket crowded as at present, in one fair-sized book. The new reporter has in the size of his first volume, and the quantity of matter it contains, done all that could be expected of him; and far more than has been his predecessor's habit to do. He gives us in this volume 99 cases, which occupy 730 of Little, Brown, & Co.'s finely printed pages. The 23d volume of Mr. Wallace, which was his last, gave us 43 cases, occupying 607 pages; thus furnishing about one-half the matter in the same compass, as compared with Mr. Otto's first volume.

In 22d Wallace we had 48 cases, with a space of 648 pages.

The mechanical execution of the volume is excellent, being in the well-known style for which the publishers are now famous. Fine paper, a clear, full page, and beautiful typography, such as are here exhibited, lead the profession to wish they could, by some constitutional legislation, be made a standard to which all law publishers should be required to conform. The reporter has done more to achieve this mechanical success than is included in his choice of a publisher. We observe with pleasure that he has given us all citations of authority in their proper place in the body of the text, instead of sprinkling them about in foot-notes. We return to him most hearty thanks for this departure from the inconvenient practices of his predecessor.

As to the character of the selections made by the reporter from his "embarrassment of wealth" of cases, it would be ungracious to attempt to discriminate, or to criticise the absence of any, unless with knowledge of the motives influencing his action. In our ignorance of these, it is difficult to see why the notable omission occurs of the cases of the *United States v. Reese, et al.*, and the *United States v. Cruikshank*, coming up from Kentucky and Louisiana respectively, in which the court examined and construed sections 3, 4 and 6 of the act of May 31, 1870, known as the Enforcement Act under the fifteenth amendment to the constitution. Perhaps these cases were reserved for a future volume.

So, also, the cases of *Henderson v. Wickham* and *Commissioners of Immigration v. North German Lloyd*, opinion by Miller, J., in which the Passenger Cases in 7 Howard are reconsidered; and *Blease v. Garlington*, (see 3 Cent. Law. Jour. 236,) in which Chief

Justice Waite's opinion settles the formerly doubtful point that the rule allowing oral evidence to be taken in equity causes was repealed by the Revised Statutes, sec. 862, are worthy of a place in this or some later volume of the regular reports. Other important cases may be named, which we trust may appear in 2d Otto, already announced.

It would seem that the case of *Piedmont and Arlington Life Ins. Co. v. Ewing*, at the same term, (omitted from this volume,) deciding that when the truth of the statement in the application for life insurance is at issue, the burden of proof is not always on the assured, (see 9 Chic. Legal News, p. 9,) is of as much importance and general interest as the case of *Ætna Life Ins. Co. v. France*, which is here reported at page 510, and which decides that statements made in such an application, warranted by the insured, must be strictly true, without reference to their materiality. (Following *Jeffries v. Life Ins. Co.*, 22 Wall. 47.)

Again, we observe that, in the case of *Forsythe v. Kimball*, reported at page 291, F. sought by bill in equity to set off some debts of other parties, amounting to about \$5,000, which he claimed to have assumed by parol to pay, against an amount (\$11,000) due him from an insurance company for losses of insured property by fire. The court refused to permit this, on the ground that, in equity as at law, parol evidence is inadmissible to vary, qualify, contradict, add to, or subtract from, the absolute terms of a written contract. This point is clearly made; but the casual reader will enquire, why should a person ask from a court of equity leave to set off, against a debt due to him from a corporation, the debts due to the latter from other parties? Was Forsythe the original of the fabled Dutchman, who insisted that his debtor who had just executed a promissory note, should hold the note, so as to keep himself reminded that he must pay it? Or have we in this case of *Forsythe v. Kimball* merely "a new way to pay old debts?"

Some person in the record, presumably the defendant Kimball, is spoken of in the opinion as "the assignee;" and it appears the losses named were incurred in the great Chicago fire of 1871. It is inferable from these circumstances that the insurance company was insolvent, that Kimball was its assignee, and that Forsythe sought a set-off as to the small *pro rata* that was due him on his claim. These material facts do not, however, appear clearly in the report; and the reporter's remark that "the facts are stated in the opinion of the court" is in this instance insufficient. Forsythe

was allowed in this case to set off his *pro rata* share or dividend against his own note for \$800. We are reminded in this connection of the companion case of Scammon v. Kimball, (see 3 Cent. Law Jour. 577,) decided at the same term, but which the reporter has omitted from this volume. In this case, Scammon was not permitted to set-off, as between himself and Kimball as assignee of the same insurance company above referred to, the *pro rata* amount coming to him on account of his losses by fire, against his own balances of unpaid stock of the company; but was required to make up his unpaid stock subscriptions in full. This case might well have been allowed to accompany the Forsythe case; especially in view of the other cases appearing in this volume of Upton v. Tribilcock, Sanger v. Upton, and Webster v. Upton. These were all cases instituted by Upton as assignee of the bankrupt Great Western Insurance Company, and the opinions were rendered by three several judges. In Tribilcock's case, he was compelled to pay his unpaid stock subscriptions, against his defence that he had been estopped and defrauded into making them, where it appeared that he had ample opportunity to know the alleged fraud, and to disaffirm his subscription prior to the bankruptcy of the company. In the Sanger and Webster cases, it was held that the mere ownership in a corporation of stock implies a promise to pay all lawful calls thereon, and renders the holder liable to a suit to recover the amounts unpaid. All these three cases, as well as Scammon v. Kimball, follow the principle of Sawyer v. Hoag, 17 Wall. 610, that the capital stock of a corporation is a trust fund for the payment of its debts to its creditors, which must in all cases be applied to that purpose *pro rata*.

Others of the cases reported by Mr. Otto in this volume are worthy of more than a passing notice. In Mayer v. Hellman, p. 496, it was held that a voluntary assignment by a debtor, for the use and benefit of all his creditors, and without conditions or preferences, when made more than six months prior to the assignor's bankruptcy, is not open to an attack from his assignee in bankruptcy. This ruling is based mainly on the limitation prescribed by the Bankrupt Act; but it was also said that such an assignment is not generally void or voidable as to creditors. But can it be deemed void as to the Bankrupt Act and the assignee appointed thereunder, when made within the time named in the act as to conveyances deemed obnoxious to that act?

The court was asked by counsel on each side to decide this ques-

tion, but declined, not deeming it necessary to the disposition of the case ; while referring with favor to the position assumed in behalf of the voluntary assignment, that it could not be considered a preference, nor in any manner obnoxious to the act, because it was really in harmony therewith, and aimed to accomplish the same result (in part) by readier means. Exactly the opposite of this doctrine was held by Emmons, J., in the sixth circuit, in the subsequent case of *Globe Ins. Co. v. Cleveland Ins. Co.*, reported in 8 *Chicago Legal News*, 258, where such an assignment is held to be *per se* an act of bankruptcy, and therefore absolutely void under the Bankrupt Act. In this connection, it is noticeable that Congress, in the act of July 26, 1876, carried its amendment of the Bankrupt Act, upon this subject, no farther than to provide that such a voluntary assignment prior to bankruptcy should not of itself be a bar to the debtor's discharge. The Supreme Court may yet be called on to determine distinctly whether it approves or disaffirms the doctrine enunciated by Judge Emmons, that such assignment is in itself void as to the assignee and the creditors whom he specifically represents.

In two other instances, however, Congress has passed amendments to clear up doubtful points under the Bankrupt Law, which the Supreme Court has in this volume subsequently held to have been an unnecessary precaution, viz. : In *Lathrop v. Drake* it was held that an assignee may sue to recover assets of the estate in a circuit court, in any district other than that in which he was appointed ; and in *Lamp Chimney Co. v. Brass and Copper Co.*, it was held that a creditor of a bankrupt corporation may sue it and recover judgment on his claim, crediting the amount of dividend he may have received.

Raymond v. Thomas, p. 712, holds that the order of a military commander in South Carolina, in 1868, annulling a decree rendered by a court of chancery, in a case within its jurisdiction, was void. *Earle v. McVeigh*, p. 503, avoids a judgment founded on a notice posted on the door of a house where defendant had lived, but from which he and his family had been absent seven months in the lines of the Confederate army ; it was not in this case his "usual place of abode."

United States v. McKee, p. 442, is a case of much longer standing than *Crosby v. Buchanan*, in 23 *Wall.*, and possessed of almost as many romantic features ; and the court disposed of it by allowing interest upon a Revolutionary claim from 1779 to the present time.

Welton v. Missouri, p. 275, a writ of error to the Supreme Court of Missouri, in a case of some celebrity, determines that a state license tax on peddlers who sell goods made in another state, not also levied on those selling goods made within the state, is in conflict with the power of Congress to regulate commerce among the states, and must be disregarded.

Kohl v. United States, p. 367, sustains not only the eminent domain of the United States government, but also the jurisdiction of the Federal courts, inherent and independent of state tribunals, to entertain proceedings for the condemnation of property for the public purposes of the United States.

armers' and Merchants' National Bank v. Dearing, p. 29, denies the amenability of the national banks to the usury laws of the states, and holds that the National Banking Act establishes the only penalties that may be imposed on such banks in cases where usury has been taken or reserved. This case was a writ of error to the Court of Appeals of New York, and reversed the ruling of that court.

In Nudd v. Burrows, p. 426, the Federal Practice Act of 1872, assimilating "the practice, pleadings and forms, and modes of proceeding, in civil causes, other than equity and admiralty causes," in the Federal courts, "as near as may be" to those obtaining in the courts of the respective states, was held not to apply to or control in any manner the "personal administration by the judge of his duties while sitting upon the bench." The appellate court upheld the circuit judge in his refusal to conform to a state law requiring all instructions to juries to be submitted in writing, and to be taken by the jury in their retirement; and said: "The personal conduct and administration of the judge in the discharge of his separate functions, is, in our judgment, neither *practice, pleading, nor a form nor mode of proceeding*, within the meaning of those terms as found in the context."

In Eyster v. Gaff, p. 521, which was a writ of error to the Supreme Court of Colorado, a proceeding in the territorial court to foreclose a mortgage, and a consequent sale and divestiture of title, were upheld; notwithstanding the mortgagor had become a bankrupt pending such proceedings, and his assignee was not made a party. It was held that the same rule would apply, whether the mortgagor had lost the legal title by his mortgage, and had only an equity of redemption, or held the legal title until foreclosure; in either case the assignee has no greater rights, and is no more a

necessary party, than would be any vendee of the mortgagor who might buy *pendente lite*.

The court exploded a fallacy which has been quite generally entertained, in respect to the effect of the Bankrupt Law on pending suits, and tersely said: "It is a mistake to suppose that the Bankrupt Law avoids of its own force all judicial proceedings of the state or other courts, the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition." This overrules the decisions of the lower courts in several districts.

Besides cases like the foregoing, involving questions peculiar to the jurisprudence of the Federal courts, we find in this volume several cases in which are considered important questions of mercantile law, from which, as a sample, may be selected *Hoover v. Wise*, p. 308. Hoover, as assignee in bankruptcy, appointed in Nebraska, sued in the state courts in New York to recover moneys collected from his bankrupt after commission of acts of bankruptcy. The Nebraska lawyer who made these collections, and who, it seems, kept the money himself, had knowledge of these acts of bankruptcy, and, knowing the insolvency of the debtor, procured his confession of judgment within four months prior to the bankruptcy. But this lawyer had been employed, not directly by the creditor, but by a mercantile agency in New York City, to which the collection had been entrusted by the creditor. The courts of New York decided that the mercantile agency in this case was, like a bank in similar cases, an independent actor undertaking the collection, and that the agency and fraudulent knowledge of the Nebraska lawyer were referable to the mercantile agency alone, and not to the creditor. From this judgment a writ of error was taken to the Supreme Court of the United States, which *affirmed the judgment* in an opinion delivered by Hunt, J., based on the considerations above stated. In this view of the case, as there was no violation of the Bankrupt Act committed, the question recurs, where was the Federal question in the case which could give the United States Supreme Court jurisdiction? On the case as stated by Justice Hunt, should not the judgment of the court have been a disclaimer of jurisdiction, instead of an affirmance of the New York judgment? The dissenting opinion of Justices Miller, Clifford and Bradley, which is apparently the sounder opinion, is based on the pregnant facts, that the employments of both the mercantile agency and the attorney were contracts of agency purely, and that the attorney necessarily and

properly made the collection in the name of the creditor ; whereas it is far different in case of a bank, which collects mercantile paper, not as a mere agent, but in its own name as an independent, intervening actor. In this view of the case, the fraudulent conduct of the lawyer would affect his principal, the creditor, and through this consideration, perhaps, the Federal court might have acquired jurisdiction ; but how otherwise, it is difficult to see.

Mr. Otto's first volume includes, also, besides numerous other cases of general interest in different departments of the law, the usual number of cases in admiralty and patent law, as well as cases based on claims against the government, and cases involving questions of practice. Among the latter, it may be noted that the court was actually called upon in *Roemer v. Simon* to adjudicate that it could not receive new evidence prepared after an appeal had been taken !

In patent law, the case of *Brown v. Piper*, p. 37, is noticeable by reason of the extent to which the court consented to take judicial cognizance of well-known facts. As judicial knowledge had heretofore been taken of the meaning and popular understanding of "the fable of the frozen snake," so it is here taken, as to the common use of cold and freezing mixtures as a preservative, and patents based on the application of such agencies are held void for want of novelty. In this connection, reference is made to Lord Bacon's final experiment of preserving poultry by means of snow, which he made imprudently and caused his last illness.

The references we have made to the cases reported by Mr. Otto will doubtless suffice to show that this, his first volume, is as full of interesting matter "as an egg is of meat." It could scarcely be otherwise, because of the high character of the court, the great and wide range of cases appealed to it, and the importance of the questions involved.

It is impossible to rise from the examination of this volume without a conviction of the elevated tone and the admirable integrity of the court, traceable plainly to the conservative influences which positions so exalted and responsibilities so vast always exert over men of education, candor and sincere convictions. Some of the expressions contained in the decisions in this volume are worthy to be preserved, read and studied, and taught diligently to the youth of the land, as antidotes to many of the baleful doctrines of loose political, mercantile and social morality which are abroad among our people, and the assertion of which alone is a mark of degener-

acy. Pertinent to the law as to written contracts, it is said: "A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission," (p. 50). Stock speculations and stock gambling are thus stigmatized: "The idea that the capital of a corporation is a foot-ball, to be thrown into the market for purposes of speculation, that its value may be elevated or depressed to advance the interests of its managers, is a modern and wicked invention." *Upton v. Tribilcock*, p. 48. So, again, of the duties devolving on the directors of such corporations: "That a director of a joint-stock corporation occupies one of those fiduciary relations where his dealings with the subject-matter of his trust or agency, and with the beneficiary or party whose interest is confided to its care, is (*sic*) viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality." *Twin-Lick Oil Co. v. Marbury*, p. 588. Other instances of like wholesome utterances are familiar to all students of the present Supreme Bench. One striking quality of the foregoing extracts is their terseness. Indeed, it has been remarked by many members of the profession that the judges of this high tribunal are advancing in the habit of condensing their decisions, so that often their utterances are distinguished at once by a brevity of expression and a breadth of meaning. Thus, it is said, in *Welton v. Missouri*: "Commerce is a term of the largest import. It comprehends intercourse for the purpose of trade in any and all its forms," (page 280.) And again, as illustrative of those principles of pleading which exist independently of, and cannot be controlled or limited by, mere forms: "Special pleading is still allowed in certain jurisdictions; and if the plaintiff and defendant in such a forum elect to submit their controversy in that form of pleading, the losing party must be content to abide the consequences of his own election." *Gould v. Evansville R. R. Co.*, p. 527.

If our courts can by common consent imitate a general practice of thus crystallizing all, or even the greater part, of their decisions into compact forms of expression like those cited, the profession may be encouraged to hope that a limit can be found to the present redundancy of our books of reports.

Reflecting upon the vast power exercised by this high court, and the apparently slight tenure of the responsibility to which it is subjected, it is comforting to every lover of his country to observe the eminent conservatism which has always characterized the utterances of the Supreme Court, even in times of the greatest partisan excite-

ment. In this one feature at least of our three-fold system of government, it is evident that the founders of our constitution made no mistake. This branch of our republican experiment has certainly been subjected already to the fullest and most severe tests. However our other departments of government may have bent under the strain of partisan excesses, the courts have certainly remained a firm bulwark of American liberty. So we may close our centennial year in the well-grounded hope that our grand-children will be enabled to celebrate the second centennial of the republic.

J. O. P.

A DIGEST OF THE LAW OF INSURANCE. Being an analysis of Fire, Marine, Life, and Accident Insurance Cases, adjudicated in the Courts of England, Ireland, Scotland, the United States of America, and Canada, commencing with the earliest reported adjudications, and continued to the present time. By OLIVER B. SANSUM, Counsellor at Law, Chicago, Ills. (Late of the Island of Barbados, British West Indies.) Chicago: Callaghan & Co. 1876.

The enterprising publishers burst upon us early in November last with this bulky octavo of 790 pages, almost without an announcement. Their part of the work, viz., press-work and binding, are in their usual excellent style. Except as to a number of errors in proof-reading, the only improvement necessary in the mechanical part of the work—and this is a matter quite as much for the compiler as for the publisher—would be the employment of more frequent catch-words in bold-faced type, suggesting the ultimate or remote topical sub-divisions of the cases digested. The whole appearance of the work is, however, so handsome, that we take pleasure in complimenting both the publishers and the compiler; the latter especially, as this, his first introduction to the legal profession of the United States, as a book-maker, is under auspices so favorable. A complete Insurance Digest was much needed, and Mr. Sansum will receive many thanks for having anticipated and endeavored to supply the want. It is no longer an open question that in the multitude of courts under our duplex system of government, we must have all possible books of ready reference in the leading specialties of our cosmopolitan practice.

We must, however, as a matter of duty—and this no less because he is a stranger from another land, whom we are glad to welcome,

—point out to the compiler certain errors into which he has fallen in this, his first American book.

The plan upon which this digest is constructed is indicated as follows in the preface: "I recognize the fact that classification or arrangement must ever remain one of the most important requisites of a Digest. This part of the work has received my careful attention. In determining the place for the question, its general name or *root*, the judgment given, and the thing carried up for special examination, have been kept steadily in view, in the order mentioned. To illustrate: if the question came up on a motion to arrest the judgment, founded upon the plaintiff's insufficient declaration, and the court arrested it, the question properly belongs to "Pleading," (the *root*,) "What Is Not Sufficient," (the foundation of the judgment,) "Of Declaration, Complaint, Bill, or Petition," (the declaration being the thing carried up for special examination.) Or, if a loss occurred before delivery of the policy, followed by a refusal to recognize the claim, on the ground that there was no contract to insure, but the court adjudged that there was a completed contract, the question is placed under "Contract," (the *root*,) "Complete," (the foundation of the judgment,) for the thing adjudged is, whether there was a completed contract between the parties at the time the loss happened."

In this it will be seen our compiler has prescribed for himself a commendably severe analysis. But we fear he has forgotten or overlooked one fact or principle, inherent in all educational matters, and which all teachers and book-makers, and the closest analyst most of all, should ever keep in mind. It is this: that while the analytical method is uniformly the best mode of treating any subject for the teacher, the student must in nearly all cases learn, or at least commence to learn, synthetically. The skilled teacher must be perfectly familiar with the analysis of his subject, but he will generally find it necessary to impart instruction in the synthetic method. No analysis can be, theoretically or properly, too severe for either a digest or a philosophical treatise on legal subjects. But the profession do not uniformly, or even generally, engage in the study of any specialty after a strictly philosophical method. Least of all is a digest resorted to in the hurry and press of professional engagements, in such a view or for such a purpose. Unless, therefore, the analytical digest be supplied with plentiful cross-references, for the ready aid of him who takes it up for synthetic examination, its use will be exceedingly limited. In the

matter of these cross-references, we find Mr. Sansum's digest deficient.

If we take, for instance, the English case of *MacKenzie v. Whitworth*, in the Court of Exchequer, L. R. 10 Ex. 142, 23 Weekly Rep. 323, affirmed in the Court of Appeal, 24 Weekly Rep. 287, which decides that, since the repeal of the statute of 19 Geo. II, c. 37, sec. 4, requiring all re-assurances to be expressed as such in the face of the policy, a contract of re-insurance is perfectly valid, though it be not so expressed or understood at the time it is made; and we wish to find what other cases, if any, have treated of this question, (and this is an instance of very common use of a digest;) and we turn to the head of "Re-Insurance" in this digest, we find no reference whatever to *MacKenzie v. Whitworth*. That case, indeed, figures under the head of "Insurable Interest," and the sub-topic, "What Interest Need Not Be Disclosed." It appears nowhere else in the book. Conceding that Mr. Sansum's analysis here is correct, and that the proper "root" here is "Insurable Interest," still, as the case appears under no other head, it is evident that he who finds it must be in precisely the same train of thought on the subject, or in other words, must be able to analyze this case and the subject, and must, in fact, analyze them precisely as Mr. Sansum does, or else he will fail to find the case. For practical purposes, the digest is closed against the investigation of cases analogous to this one on the subject of re-insurance. A cross-reference is wanting, under the head of "Re-Insurance. 1. Valid or Void Contract of," column 1181, by which the examiner shall be referred to column 717, "Insurable Interest, VI, 5," where the case of *MacKenzie v. Whitworth* is found.

Again, take the case of *Mutual Benefit Ins. Co. v. Ruse*, 8 Ga. 534, and the companion case of *Ruse v. Mutual Benefit Ins. Co.*, in 23 N. Y. 516, both involving the same question. Here there had been a failure to pay the premium on the day fixed; to excuse which a printed prospectus used by the insurer's agents, which intimated that a forfeiture would not be strictly exacted in such a case, or that more time would be granted, was offered in evidence, but was rejected as wholly inadmissible. The lawyer in practice will want to refer to these cases in connection with the subject of Evidence; but he will not find them digested under that head by Mr. Sansum. Both cases appear under the title alone of "Payment of Premium; When Non-Payment is fatal to Recovery." They are not out of place here; but there is not even a cross-reference

to this entry, under the head of "Evidence," which has the very natural and suggestive sub-topic of "Books, Papers, Letters, and Photographs."

So, upon the question of the power of a corporation to make a parol contract to insure, no cross-references can be found between the heads of "Contract," "Parol Contract," and "Ultra Vires," respectively. *Insurance Co. v. Colt*, 20 Wall. 560, appears under the several heads of "Contract," "Parol Contract," and "Payment of Premium," and does not appear under the head of "Ultra Vires," where we find *Head v. Providence Ins. Co.*, 2 Cranch, 127, with no reference to the Colt case, nor anything to bring together these two cases from the same court, so widely different in their conclusions as to exhibit an entire change in the attitude of the Supreme Court of the United States toward this question.

These instances may suffice to show that the compiler has unfortunately limited the usefulness of his digest quite materially, and failed to develop his system to its utmost capacity, by too close an adherence to literal analysis. The same amount of labor and research might have given us a better working digest.

In some other respects there are defects apparent which mar the completeness and symmetry of the digest. Under the head of "Evidence; of Deceased Persons," only two cases are cited where the declarations of the insured, made subsequent to the issuance of the policy, as to his health and habits of life, were offered in evidence. *Evers v. Life Association of America*, 59 Mo. 429, we find in another place; *Rawles v. American Mutual Life Ins. Co.*, 27 N. Y. 282, is in like manner omitted from mention under this heading, and *Southern Life Ins. Co. v. Booker*, 7 West. Ins. Rev. 96, does not appear in the digest at all, though these three cases all pass upon the question referred to, and should all properly be grouped under the title above named.

Under the head of "Evidence; Declarations of Agents," no reference is made to the important case of *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9, which appears in the digest as an authority upon several other points.

Preliminary proofs of loss are referred to as "Evidence," under a sub-title of the head "Proofs of Loss," but are not named under the general head of "Evidence," as a distinct branch thereof, notwithstanding they figure very largely as evidence in insurance cases.

The late cases, in several different American courts, which treat of the effect of our late civil war upon the contract of life insurance,

are not grouped under the compiler's very appropriate heading of "Contract; Effect of War." Mr. Sansum cites but one of these numerous cases under that head. Some of them appear elsewhere, under the heading, "Payment of Premium." But in respect to these cases, so natural is the suggestion that the effect of war upon the contract is the vital question in them, that it would seem the compiler has failed to apply to them his own chosen system of analysis.

So, again, the late cases in several courts treating of forfeitures of life policies for non-payment of interest on premium notes, might well be grouped together; and the absence of this as a separate topic is conspicuous. Indeed, the compiler has not deemed the subject of "Forfeiture of Policy" worthy of any further attention than to make a reference under it to the head of "Estoppel." But are these terms synonymous? or do they run together as convertible terms in insurance cases?

We observe that several important cases, besides those already named, are wholly omitted, which will deserve a place in the next edition of this digest; among them one touching the assignment by a husband to his creditor of a policy on his life, where the statute gave it to the wife, the contest arising between the creditor and the wife.

No complaint can be made of any paucity of cases in Mr. Sansum's digest; but we have referred to the absence of certain cases, when such absence was conspicuous by reason of the small number of cases on the particular subject, for the purpose of calling the attention of digest-makers to the propriety of including all such cases, and excluding, if any, only those which enunciate principles or rulings that are trite.

In this connection, we observe that the compiler has failed to find many leading and important cases that have been published in our enterprising law periodicals in advance of the regular reports. His citations from these sources of information are meagre. Both title and preface leave the reader in doubt as to the precise date to which the cases are intended to be included; but it is evidently some point of time in the year 1876. Be that as it may, there are many cases of the class named, published prior to 1876, that certainly ought to find a place in a complete digest. It would have been an improvement, also, had citations been made to Bennett's and Bigelow's collections of insurance cases, which are so largely used by many lawyers.

Lest it be supposed that we would have had this bulky digest any larger than it is, we beg to say that the number of cases cited in the volume is simply immense, and evinces great industry on the part of the compiler. In one respect, indeed, a diminution might be suggested. Such headings as "Agreed Case," "Money Had and Received," "Change of Venue," "Citizens," "Abatement," (of suit,) "Attorneys at Law;" and such sub-titles under the head of "Evidence" as "Foreign Laws," "Leading Questions," "Contradicting One's Own Witness," or "Refreshing Memory," have no necessary connection with, and form no part of, the Law of Insurance, and may with propriety be omitted. So may all matters peculiar to the practice of our courts, such as "Referees," "Garnishment," and "Service of Process," except such decisions as settle rules under these heads, that are in some way peculiar to the insurance contract and cases arising thereunder. Cases that deal with insurance only so far as to have an insurer for a party may be of occasional interest to underwriters, sufficient to authorize their insertion in such a digest, though we doubt it. Lawyers certainly prefer to have them presented for their use in their proper connection.

J. O. P.

CHITTY ON PLEADING. Three volumes in two. With American Notes by HON. J. C. PERKINS. New Edition. Springfield, Mass.: G. & C. Merriam. 1876.

It would be an insult to the intelligence of the American bar to attempt to describe or to commend a work which, from its earliest publication in 1808, has been deemed essential to every, even the smallest, law library, and we shall content ourselves with noting a few of the changes which have been made in the seventh English and in this edition. It will be remembered by the profession that the seventh English edition was edited by Mr. Greening, and was published in 1843, and after the adoption of the famous Rules of Hilary Term, 4 William IV. Those rules were not only given in the appendix, but also the body of the work gave the law and practice under them, while retaining most of what had been said in previous editions in regard to matters that had been affected by them. They were chiefly aimed at the scope of the old general issue in assumpsit and debt, although covering other ground, and served to restore the common law system of pleading to its ideal character, and to destroy the many arbitrary and often absurd rules that had made it

the most illogical statement of a cause of action and of its defence which is known to jurisprudence.

The text of the sixteenth American edition, so far as the treatise or volume 1 is concerned, is but a reproduction of the seventh English edition, edited by Mr. Greening. The fourteenth American edition, edited also by Mr. Perkins, and issued by the same publishers, was also taken from the same English edition; but that edition was not followed in this: Mr. Greening had omitted the common law rules of pleading so far as they pertained to defences admissible under the general issue before the adoption of the so-called Hilary Rules, as they were superseded by those rules. But, inasmuch as these rules had not been adopted in many of the states, the old text was retained by the American editor, as well as the additions by Mr. Greening. In the present edition, however, the matter thus retained in the fourteenth edition is omitted, and we have in the first volume or treatise only the English rules of pleading after the changes referred to. It is also enriched by many new American notes and citations.

I have spoken of the treatise, or the first volume; but instead of the second and third volumes of the original Chitty, the editor has given us one volume almost wholly new. We entirely miss the old ponderous precedents which so tried the patience of young pleaders, but which were the delight of experienced ones, and gave them such advantages over the former.

In reference to volume 2 the editor says: "In place of those volumes, (2 and 3 Chitty,) and as a substitute for them, a single volume of precedents carefully adapted to modern practice has been prepared, and is now published as a more suitable companion to the treatise. This volume is founded on Chitty, Jr.'s, 'Precedents in Pleading,' and contains a copious and diversified collection of forms which are clear, concise, and in every way suited to the practice of the present time. The best forms in this book of precedents have been preserved and adopted. The American editor has also selected and adopted the most valuable of the forms in the third edition of 'Precedents of Pleadings,' by Bullen and Leake, some by way of substitution for less valuable ones in Chitty, Jr., and others in addition. Reference is also made under different heads to a great number of cases in which suitable forms may be found for almost every conceivable state of circumstances that may arise for legal investigation. The editor has also introduced into the work forms of issues for trial by jury of disputed facts in chan-

cery cases, and also of issues in probate cases to try the validity of contested wills. The author has prepared the forms selected for each topic by a series of valuable observations upon the general subject, and has also appended notes to the forms for the purpose of showing the necessity, force, and operation of particular words or phrases in them, and to point out where other similar forms under the same head may be found. The American editor has endeavored largely to increase the value of these observations and notes for use in the American states, by incorporating in them statements of the American law upon the same subjects, and by citations of the American and later English cases."

This extract from the preface faithfully describes the character of volume 2, and its value will be seen at once, especially in those states that have not adopted the New York system of pleadings. There are few states, if any, where the ancient precedents, as embodied in the old Chitty, are now followed in detail. Not only had they been curtailed in England by the Hilary Rules of 4 William IV, and more especially by the Procedure Act and rules of 1852, but in the states generally, either silently or by statute, a more simple and condensed mode of statement had grown into use, and the forms in the present edition of Chitty will be far more useful than those in former editions. The introductory observations to each topic, spoken of by the editor, are a notable feature of the book. They form, indeed, very full though condensed digests of the particular subjects, and will be found of great value.

In looking at the changes made by the Procedure Act of 1852, we almost regret that our reforms did not take the same direction. By that act; all names and forms of actions at law were abolished, and instead of the old cumbrous introduction, the pleader was permitted, after giving the title of the court, the date of the pleading, and the county or venue, only to say, "A B by C D, his attorney, sues E F. In that," etc., stating the facts constituting the cause of action. For a second count the pleader was required to say, "And the plaintiff also sues the defendant for that," etc. The conclusion was equally simple: "And the plaintiff claims £——," or, in replevin, "a return of said goods or their value and £—— for their detention." No venue is to be given in the body of the declaration, or in any subsequent pleading, except when place becomes matter of local description; and all causes of actions at law were permitted to be joined in one action, except in replevin and ejectment, when the remedies would render the union inconvenient.

Thus we see, without going further into detail, that the substance, the best parts of the New York system, so far as actions at law are concerned, have long been adopted in England; and the second volume of Chitty, in the edition now before us, contains forms and precedents embodying these changes. Independent, then, of the very rich notes and observations that abound in the volume, it thus becomes of far more value than the second and third of the old Chitty. There are few states retaining the common law system that have not adopted the substance of the English reforms, and no pleader, even where the New York system is adopted, can fail to admire the clear, simple, and terse statements that are given in the volume, and to be led therefrom to improve his own style.

The work says nothing of the more recent changes in England, which, though very interesting in the history of a progressive jurisprudence, have not become of practical value to us. B.

A TREATISE ON THE LAW OF EVIDENCE. By SIMON GREENLEAF, LL.D., Emeritus Professor of Law in Harvard University. Vol. 1; Thirteenth Edition; carefully revised; with Large Additions, by JOHN WILDER MAY, Author of the "Law of Insurance," etc. Boston: Little, Brown, & Co. 1876.

This old and standard work was first presented to the profession in 1842, and since that time its popularity has gone on increasing until the present time. In England it has been republished by Mr. Taylor, with such alterations as were necessary in order to meet the requirements of the laws of that country; and now the labors of Prof. Greenleaf in this important branch of the law are daily referred to in all courts whose proceedings are carried on in the English language. The present edition is a very considerable improvement on former ones. The first volume alone refers to about nine hundred cases which have been reported since the date of the last edition; and yet the arrangement of the matter has been so skilfully made that the size of the volume is but little increased. The index has been enlarged, and the number of cross-references has been increased. Catch-words in a different type have been prefixed to the sections. This is a very desirable improvement in a work which, above most others, is required for instantaneous use in the court room. They afford also a kind of artificial aid to the memory. The law of evidence is by no means deficient in intricacy or extent, and a perfect familiarity with it is a matter of the first

importance to the practicing lawyer. Questions of evidence must be promptly disposed of as they arise, and the advocate who has not fully mastered the learning on the subject is not well equipped for any forensic contest upon which he may enter. These questions usually turn up in an unexpected manner, and but little time is given for their discussion. The lawyer who can at once refer to the law on the subject, instead of propounding vague generalities, is an efficient aid to the court, and is apt to prove a valuable ally for his client. Not unfrequently an important rule of evidence is not thought of until the trial is over; and the reports are full of cases where objections to evidence are overruled in the appellate courts, not because they are not well taken, but because they were not taken on the trial; and thus good cases are often lost. "Too early seen unknown, and known too late."

This edition bears the marks of the greatest diligence in its preparation, and of a sincere desire to make it acceptable to the highest critical faculty of the profession; and we doubt not that it will stand the closest scrutiny with unusually favorable results. With its clean, white paper, clear type, smooth and elegant binding, it puts the best previous edition—that much-used book—as it is now generally found, dimmed by much handling, and badly dog-eared, very much to shame. It would be almost worth while to buy this edition on the score of beauty, without regard to its improvements of substance and arrangement.

U. M. R.

A TREATISE UPON CONVEYANCES MADE BY DEBTORS TO DEFRAUD CREDITORS. Containing references to all the cases, both English and American. By ORLANDO F. BUMP, Counsellor at Law. Second Edition. New York: Baker, Voorhis & Co., Publishers, 66 Nassau street. 1876.

This new and revised edition of Mr. Bump's valuable work shows an addition of 72 pages, making a total of 600 pages of text. The principal accretions are in the chapters devoted to "What Transfers are within the Statute," "Assignments for the Benefit of Creditors," "How Far a Fraudulent Transfer is Void," and "Remedies." To these chapters several sections are added, and a number of other chapters are re-arranged and re-written, in whole or in part. But the general plan of the work and the division into chapters remain unchanged. This fact renders it a matter for regret, that an entirely new paging has been adopted in the present edition, while that followed in the first edition has been completely aban-

done. Much inconvenience will result from this, for the work is so useful, and is so largely used by the profession, that frequent citations from it are made both in opinions and briefs. A permanent, standard work should have but one paging, so that citations from it by pages may furnish the same clues to enquirers, "yesterday, to-day, and forever." By thus early abandoning the paging of his first edition, Mr. Bump may be understood to have expressed a want of confidence in the permanence of his own work.

But the work can hardly prove ephemeral. The subject certainly will not, for it has, during the four years intervening between the two editions of this work, grown both in bulk and importance. Several hundred cases are referred to in the present volume, in addition to those cited in the first edition.

The style and character of Mr. Bump's labors in this field of jurisprudence have become familiar to the bar. His work, from its first publication, was found to answer to a great extent a professional demand. The large number of cases cited by him shows extended and industrious research; and it may be presumed that he who takes up the work to use it as a digest will find all the case-law the exigencies of his investigations may require.

As a philosophical treatise, however, the work shows certain defects. The admirable aim is proposed by the author to himself, in his preface, of attaining "unity and symmetry" in his treatise "by considering the law of fraudulent conveyances as simply a part of the common law, and as the same in every country where Anglican law prevails." This canon is adopted in view of the rule that the English statutes, and therefore their American copies, are but declaratory of the previously existing common law. But Mr. Bump limits his own power over the subject; he endeavors to elucidate by expressly declining to explain any of the variations from the general law upon the subject, that may obtain in particular states, on the ground that such explanations would not interest the profession.

He merely warns the local practitioner that "the text is not applicable to his particular state." With respectful deference to the author's right to control the plan of his own work, we sug-

the duty of any author, under such circumstances, to point out the character of the errors that may distinguish the opinions of any respectable state court of last resort, and explain, if possible, how such errors arose, and how they may be corrected. This is a part of the duty the author owes to the profession he aims to serve. It is a part of his duty toward that "jealous mistress,"

the law, whose "unity and symmetry" he professes to believe in. The mere suggestion that some state court has decided contrary to the law as presented by the author in his text seems to carry the inference that such contrary opinion is of too little account to receive further notice.

Especially are these considerations true in respect to a branch of the law in which, as Mr. Bump states, "conflict was there before he began his investigations, and will continue after his labors have ceased." In such an unusual case surely the profession are interested in having the subject so treated as to fortify the strong positions of the law against all attacks and to disarm all opposition.

Again, this treatise is thus advertised by the publishers: "This work is constructed upon the theory that Fraud is always a question of Intent, and is arranged throughout to unfold and develop this theory. This arrangement gives unity, system, and symmetry to the whole treatise, and renders it clear and compact."

Doubtless the publishers have in this statement correctly interpreted the design of a work upon "Conveyances Made by Debtors to Defraud Creditors," for the title itself expresses the author's limitation of his own treatise to cases involving a fraudulent intent. We find, too, that he has apparently assumed this substantial fact, which this theory presupposes, and has devoted but thirteen pages of his text to the subject of "Fraudulent Intent," after explaining "What Constitutes a Fraudulent Conveyance" in the brief space of a trifle over three pages. There is, however, a large class of fraudulent conveyances, illustrated in the cases referred to in an article in this REVIEW, (p. 731,) in which the intent of the parties is wholly immaterial. What will be done with such cases in a treatise based on the theory that fraud is always a question of intent? They are not wholly ignored by Mr. Bump, as might be expected from his publishers' advertisement. A large number of this class of cases are cited by him, in support of the proposition, inconsistent with his theory of fraud, that as their legal effect is to hinder, delay, and defraud creditors, "the law imputes to them a fraudulent purpose, *without regard to the actual motives* of the parties," (p. 124.) This essentially fraudulent character of such conveyances is further illustrated in language drawn from opinions, which the courts have expressly recognized the good faith of the parties, and the absence of fraudulent intent; among them is *Robinson v. Elliott*, 22 Wall. 513.

Indeed, is from this class of cases that the author has, under

his head of "Fraudulent Intent," drawn the definition of fraud, which he apparently approves, that "what constitutes fraud is a question of law ; it is the judgment of the law *upon facts and intents*," (p. 26.)

These apparent divergences among the decisions are not to be harmonized upon any theory of a *legal presumption* of a fraudulent intent. Presumptions are applied by the law to many cases, in order to reach the conclusion of fraud ; notably in questions of possession under suspicious circumstances, from which the law presumes an intent to defraud, the possession being innocent enough unless with such intent. But in the class of cases above referred to, of mortgages, reserving either a power of sale or the unrestricted use of consumable articles, presumptions as to intent are no more relied on than proof as to intent. Imputation, and not presumption, is here exercised. The law imputes to the transaction an essentially fraudulent tendency, inherent therein, not depending upon proof of intent, and, therefore, not requiring the aid of presumption in lieu of proof. Such conveyances are fraudulent, though not fraudulent. The latter term would best describe conveyances intended "*to defraud*" creditors, or those in which fraud actually exists. These may, indeed, be properly included under the term "fraudulent ;" but that adjective is doubtless so comprehensive as to include conveyances not infected with any intent to commit fraud, while they yet tend so inevitably toward fraud as to be condemned by the law. P.

UNITED STATES REPORTS, SUPREME COURT, VOL. 92. October Term, 1875. Reported by WILLIAM T. OTTO. Vol. 2. Boston : Little, Brown, & Company. 1876.

This second volume of the new reporter keeps the fair promise of the first volume, both in respect to the quantity of matter furnished and the manner in which it is presented. As to the quality, or the character of the cases reported, it will, no doubt, be equally satisfactory. The important cases elsewhere noticed as omitted from Mr. Otto's first volume are now reported, together with many others of equal importance ; the volume containing in all 94 cases, (exclusive of those which are mere repetitions of the decisions in other cases,) which occupy a space of 766 pages. The longest reports in the volume are the "State Railroad Tax Cases," three cases determined together, which have been reported in the law

periodicals under the title of *Taylor v. Secor*, *Miller v. Jessup*, and *Miller v. Kidder*, and which here occupy 43 pages, embodying a statement of facts much longer than accords with Mr. Otto's custom; and *United States v. Reese*, the Kentucky case, arising under the Enforcement Act of May 31, 1870, in which 42 pages are devoted wholly to the opinion of Chief Justice Waite, and the dissenting opinions of Justices Clifford and Hunt. The enforcement case from Louisiana, of *United States v. Cruikshank*, occupies 27 pages, including the dissenting opinion. *Terry v. Tubman*, p. 156, is an interesting case under general rules of law, holding that in case of the insolvency of a bank, the time when the bank refuses or ceases to redeem its issue, and is notoriously and continuously insolvent, is the time when a right of action accrues in behalf of a bill-holder against a stockholder, so as to commence the running of time with reference to the Statute of Limitation. *Garsed v. Beall*, p. 684, holds that in equity cases, while disputed questions of fact may be referred to a jury, their verdict will not be conclusive, either before the chancellor or in an appellate court, and will be only influential in the latter. In this case the appellate court sustained the verdict after patiently reviewing the whole of the evidence in the case. *Smith v. Vodges*, p. 183, follows *Lloyd v. Fulton*, in 91 U. S. 479, in sustaining a voluntary settlement upon a wife, in a case appearing to be honest in intent; the maxim being laid down in both cases, that fraud in such settlements is always a question of fact with reference to the intention of the grantor. But we observe that Mr. Otto has indexed one of these cases under the head "Wife," and the other under the head "Settlement," which leads to the suggestion that a critical profession will expect of this new and already favorite reporter the best and most perfect indexing possible.

So the case of *Terry v. Tubman*, above referred to, is to be found in the index, not under the head, either of "Limitations" or "Statute of Limitations," but under that of "Georgia;" and the somewhat similar case of *Carrol v. Green*, p. 509, is indexed under the head of "South Carolina" alone, but not where one, seeking a case arising under the Statute of Limitations, would naturally look for it. Other errors and omissions in this reporter's indexes have been brought to the reviewer's attention by members of the profession.

Among the cases in this volume arising under the Bankrupt Law may be noted *Burbank v. Bigelow*, p. 179, which decides that

assignees in bankruptcy may be sued in the United States Circuit Court in any district, the jurisdiction being acquired in the particular case both by virtue of the provisions of the Bankrupt Law and also by reason of the separate citizenship of the parties; and the two cases in 91 U. S., of *Lathrop v. Drake*, p. 516, and *Eyster v. Gaff*, p. 521, are approved and re-affirmed.

But this mere glimpse of the character of the contents of the volume is all that our space will afford. It is plain that if the profession are to expect any material abridgment of the amount of matter covered by the reports of the opinions of the Supreme Court, beyond that which the care in selection and pains in condensation exhibited by Mr. Otto will afford, it must be secured by some curtailment of the great number of cases which may, under present rules, be carried into that tribunal for re-examination.

It is a noticeable feature of Mr. Otto's reporting that he has dispensed with the illustrations of models and plans involved in patent cases, that have distinguished the preceding volumes of the reports of this court. The taste displayed by Mr. Otto's predecessor in this respect may have been the most really correct. Still, the patent cases that are still numerous among the decisions of the Supreme Court do not possess the greatest interest for the majority of lawyers; and they are among those which many would prefer to see lost to the jurisdiction of the appellate court—at least until the press of cases upon its dockets is somewhat diminished. It is more to the convenience of the profession to have the illustrations in this special class of cases banished to an appendix, or relegated to those volumes of special reports which pertain to patent cases alone.

P.

A DIGEST OF THE LAW OF EVIDENCE. By JAMES FITZJAMES STEPHENS, Q. C. Reprint. St. Louis: Soule, Thomas & Wentworth. 1876.

The author of the English edition of this Digest of the Law of Evidence has announced that his object in preparing the work has been "to separate the subject of Evidence from other branches of the law with which it has been commonly mixed up; to reduce it into a compact, systematic form, distributed according to the natural division of the subject-matter; and to compress into precise definite rules—illustrated, when necessary, by examples—such cases and statutes as properly relate to the subject-matter, so limited and arranged."

The publishers of the American reprint have evidently sought to place before the profession a practical realization of the purposes of the English author.

It is certainly a novelty to announce and produce a handy volume edition of the Law of Evidence. Yet it seems to be in entire accord with the purposes of the author, and the work of the publishers has been well done.

With the exception of Article 91 of Chapter XII, all subjects not strictly within the designation of the Law of Evidence have been purposely omitted by the author. He has grouped and illustrated, as the rules of evidence, those which determine what facts may, and what may not, be shown in particular cases; what sort of evidence must be given of a fact which may be proved; by whom, and in what manner, the evidence must be produced by which any fact is to be established.

The purpose has been to present principles with illustrations of their practical application. While precision has been the main object, yet the handling of the subject has been at the same time comprehensive.

“My attempt in this work,” says the author, “has been emphatically *petere fontes*—to reduce an important branch of the law to the form of a connected system of intelligible rules and principles.”

We express the opinion, emphatically, that the attempt has proven a success, and we commend this little book most heartily to the profession. Observing its distinctions, there can be no room for confusion.

We commend this compendious presentation of the rules of evidence to the judge at *Nisi Prius*, as enabling him to recur, at once, to established principles of the Law of Procedure, requiring hourly application; to the advanced student, as a guide, which will surely lead him to observe unceasingly the vital distinction between relevancy and proof; and to the trier of causes, as a loyal auxiliary, rich in often needed and most welcome illustration.

C. H. K.

A TREATISE ON THE LAW OF FIXTURES. By MARSHALL D. EWELL.
Chicago: Callaghan & Co. 1876.

The author, in treating of a subject at once intricate and attractive, has been fortunate in his choice. He has selected for his

theme a species of property which, as has been said, is the dividing line between real and personal, and to decide on which side of the line certain things belong is as vexatious as it is difficult, and becomes greater as the point of division is approached. It is interesting to trace the origin and growth of this branch of the law, and the causes which from time to time modified the strict rules which first obtained. The history of the growth of this doctrine is the history of property rights, weakened by innovation caused by national growth, and restricted by judicial power dictated by public policy. In early times in England the position of a land owner was a particularly happy one. Above his acres might fittingly have been placed the words which Dante saw over the portals of the lower regions; for to the unfortunate tenant who placed his chattels upon the land, the hope was indeed small that he would ever be able to get them out—they cleaved to the soil in the most extraordinary manner. The public stood in no better position; for “if a man be hung in chains upon my land, after the body is consumed I shall have gibbet and chains,” is laid down in the books.

Presently, however, the power of the trader commences to show itself, and the power of the landlord to correspondingly diminish. It asserts itself even in the courts of law, and, being recognized by the judges, from the hand of the land owner trade-fixtures slip through a judicial decision. Later, the tiller of the soil desires the declaration of a like right, and comes before the court, but Lord Ellenborough (*Elwes v. Mawe*, 2 Sm. L. C. 162)

“Stated the case and the question, and spoke their considered opinion; No right had the defendant, they held, to remove these buildings. Wisely he showed how the general rule bids cleave to the freehold. Things by the tenant once fixed, and explained the divers exceptions. Suffered in favor of trade, the furnace, the vats, and the boilers, Also the new fire engines, the cider mills, and the salt pans; Ever in favor of trade such exceptions, no mention of farming. Further to stretch the exception to mere agricultural buildings, Not for a certain trade, where great and rash innovation. Wherefore Elwes, the shrewd, maintained his cause and his verdict.”

Though the ruling in this celebrated case, which Mr. Ewell reports in full, has not been disturbed, to any extent, to this day, a perusal of this volume and a study of the later adjudications will show that the doctrine of *stare decisis* is being frequently discarded, and the intention of the party making the annexation more fre-

quently considered. The maxim, *quicquid plantatur solo, solo cedit*, is giving place to the more common sense view taken of the subject in *Teaff v. Hewitt*, 1 Ohio St. 511, that "the true criterion of a fixture is the united application of the following requisites: 1st. Actual annexation to the realty, or something appertaining thereto. 2d. Application to the use or purpose to which that part of the realty with which it is connected is appropriated. 3d. The intention of the party making the annexation to make a permanent accession to the freehold."

On the question as to what constitutes annexation, the case of *Snedeker v. Warring*, decided by the New York Court of Appeals in 1854, and noticed here at length, is both novel in its nature and decided upon general principles. Thom, the sculptor, having mortgaged his property, erected thereupon a dwelling house, built in the Gothic style, of red stone, and a sun dial; and placed upon a base, in the lawn in front of his house a colossal statue of Washington. On a sale of the property under a foreclosure, a contention arose as to the nature of the property of the dial and statue. The dial was three or four feet in height, supported upon a pedestal of red stone. This pedestal rested upon a flag covering a well, and was kept in this position by its own weight alone, which was about two hundred pounds. The statue and pedestal, weighing between three and four tons, were made from a single block of red stone. The statue was not in any way secured to the base, except by its own weight, and had never been removed from its position since it was placed there, some seven years before the trial. Mr. Thom testified that he intended to sell the statue, and placed it upon the base only to remain there only until he could sell it. As no case could at that time be found, in either the English or American courts, deciding in what cases statuary placed in a house or on grounds should be deemed real, and in what personal, property, the court was obliged to determine the question upon the general principles of the law. It seemed plain enough that statuary exposed for sale in a workshop, or temporarily placed on exhibition, was personalty. But the court, after an exhaustive review of the Civil and the French law, held that it must be considered as a part of the realty, on the ground that the intention of the proprietor was shown in the erection of a permanent base on which to place it. In noticing the contention that it was annexed to the base by its weight alone, Parker, J., used the following language: "It is said the statues and sphinxes of colossal size, which adorn the avenue leading to the

Temple of Karnak at Thebes, are secured on their solid foundations only by their own weight. Yet, that has been found sufficient to preserve many of them for four thousand years, and if a traveler should purchase from Mehemet Ali the land on which these interesting ruins rest, it would seem quite absurd to hold that the deed did not cover the statues still standing, and to claim that they were the still unadministered personal assets of the Ptolemies, after an annexation of such long duration. No legal distinction can be made between the Sphinxes of Thebes and the statue of Thom. Both were erected for ornaments, and the latter was as colossal in size and as firmly annexed to the land as the former, and by the same means. I apprehend the question whether the Pyramids of Egypt or Cleopatra's Needle are real or personal property, does not depend upon the result of an enquiry by the antiquarian whether they were originally made to adhere to their foundations with wafers or sealing wax, or a handful of cement. It seems to me puerile to make the title to depend upon the use of such, or of any other adhesive substances, when the great weight of the erection is a much stronger guaranty of permanence."

This work contains over five hundred and fifty pages, and is divided into fourteen chapters, following substantially the arrangement adopted by Mr. Ferard, treating consecutively—Of the Definition and Nature of Fixtures; Of the Right to Fixtures, as between the Owner of the Freehold and a Stranger making Annexations thereto; Of the Legal Effect of Annexation of Chattels to the Soil of Another with His Consent, or Under a Contract, Expressed or Implied, as to their Removal; Of Fixtures as between Landlord and Tenant, Heir and Executor, and Tenants for Life or in Tail; and their Personal Representatives, and the Remainderman or Revisioner; Of Chattels, Heir-Looms, Emblements, etc.; Of the Transfer of Fixtures by Conveyance, Mortgage, Devise, in case of Bankruptcy; Of the Seizure and Sale of Fixtures on Execution; Of Exemption from Distress; Of Rights and Liabilities respecting Land as Increased in Value by the Annexation of Personal Chattels; Of the Legal and Equitable Remedies respecting Fixtures, and of the Criminal Law relating thereto. Several sections on such topics as Annexations to the Freehold of a Church, Ecclesiastical Persons, English Bill of Sale and Agricultural Holdings Act, Poor Rates, Parochial Rates, may strike the American practitioner as somewhat foreign to what he desires to know of the subject of Mr. Ewell's treatise. But it is a sufficient

answer to any adverse criticism on this point to say that this work is intended for the English as well as the American practitioner ; that the author commenced his labors with the design of including in it all the adjudicated cases in this country and England, from the earliest date to the present time, and that an examination of the cases under these heads will show that they are decided on principles applicable to cases arising here.

L.

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Aberdeen,	Jno. B. Sale.	Kosciusko,	D. C. Wasson.
"	R. O. Reynolds.	Meridian,	S. B. Watts.
Beauregard,	L. O. Briedwell.	Natchez,	R. North.
Brandon,	J. M. Jayne, Jr.	Oxford,	Hon. R. A. Hill.
Coffeeville,	Geo. H. Lester.	Port Gibson,	J. L. Humphreys.
Friar's Point,	Jas. T. Rucks.	Scooba,	Ellis & Brame.
Handsboro.	T. J. Humphries.	Vicksburg,	Catchings & Ingersoll.
Hazelhurst,	T. E. Cooper.	"	H. F. Cook.
Jacinto,	L. P. Reynolds.	West Point,	White & Bradshaw.
Jackson,	Hon. A. H. Handy.	Woodville,	L. K. Barber.
"	Hon. J. Z. George.	Yazoo City,	Miles & Epperson.
"	W. L. Nugent.		

MISSOURI.

Appleton City,	H. W. Grantley.	Kansas City,	Dunlap & Freeman.
Bolivar,	Jno. W. Ross.	"	J. Brumback.
Brookfield,	Ell. Torrance.	"	Holmes & Dean.
Brunswick,	Chas. Hammond.	"	J. H. Lipscomb.
Bucklin,	Thos. Whitaker.	Kingston,	Lemuel Dunn.
Chillicothe,	C. H. Mansur.	Louisiana,	A. L. Loucks.
Columbia,	S. C. Douglass.	Macon,	A. F. Foster.
Farmington,	Hon. F. M. Carter.	"	A. J. Williams.
Fredericktown,	B. Benson Cahoon.	Milan,	L. T. Hatfield.
Hannibal,	Wm. P. Harrison.	New London,	Wm. Christian.
"	James Carr.	Perryville,	G. W. Gostorf.
"	Richard Dalton.	Plattsburg,	Thos. E. Turney.
Harrisonville,	H. Clay Daniel.	Poplar Bluff,	S. M. Chapman.
"	R. T. Railey.	Potosi,	W. S. Relfe.
Independence,	J. H. Slover.	Sedalia,	Hon. T. C. Sears.
Ironton,	J. P. Dillingham.	"	R. P. Garrett.
Jefferson City,	J. S. Botsford.	"	Heard & Jackson.
"	A. M. Lay.	"	U. F. Short.
"	Henry W. Ewing.		

MISSOURI—Continued.

POST OFFICE.	NAME.	POST OFFICE.	NAME.
Sedalia,	Houston & Bothwell.	St. Louis,	Hon. H. M. Jones.
"	Sam H. Gleason.	"	Britton A. Hill.
St. Joseph,	A. H. Vories.	"	Theo. Hunt.
"	H. M. Ramey.	"	F. N. Judson.
"	R. T. Musser.	"	Jacob Klein.
St. Louis,	Edmund T. Allen.	"	Chester H. Krum.
"	A. D. Anderson.	"	Alex. Martin.
"	Hon. J. O. Broadhead.	"	E. P. McCarty.
"	Geo. A. Castleman.	"	H. E. Mills.
"	W. F. Causey.	"	N. Myers.
"	M. M. Cohn.	"	Jno. W. Noble.
"	J. P. Colby.	"	S. Obermeyer.
"	Rob. E. Collins.	"	J. W. Phillips.
"	H. I. D'Arcy.	"	Hon. Albert Todd.
"	M. C. Day.	"	L. B. Valliant.
"	Daniel Dillon.	"	M. W. Watson.
"	C. P. Ellerbe.	"	Hon. J. G. Wærner.
"	S. T. Glover.	Trenton,	Low & McDougall.
"	Grover & Ellis.	Warrensburg,	Jno. J. Cockrell.

NEBRASKA.

Crete,	Hon. W. H. Morris.	Lincoln,	T. M. Marquette.
Fremont,	W. A. Marlow.	"	Amasa Cobb.
Kearney,	L. A. Groff.	Omaha,	Hon. J. M. Woolworth.

NEVADA.

Carson,	Harris & Coffin.	Eureka,	Hillhouse & Davenport.
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NEW HAMPSHIRE.

Nashua,	Geo. Y. Sawyer & Sawyer, Jr.
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NEW JERSEY.

Newark,	John W. Taylor.	Princeton,	L. H. Anderson.
New Brunswick,	Jas. H. Van Cleef.		

NEW MEXICO.

Cimarron,	Francis Springer.	Santa Fe,	T. B. Catron.
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NEW YORK.

Albany,	N. C. Moak.	New York,	Hon. D. McAdam.
"	L. G. Hun.	"	Jno. F. Baker.
Brooklyn,	P. S. Crooke.	"	Richard O'Gorman.
Buffalo,	E. C. Robbins.	"	Morrison, Lauterback &
Ithica,	King & Montgomery.	"	Springarn.
Kingston,	Hon. T. R. Westbrook.	"	Geo. Gray.
Lockport,	Jno. E. Pound.	Rochester,	H. & G. H. Humphrey.
Monticello,	A. C. & T. A. Niven.		

NORTH CAROLINA.

Ashville,	W. M. Cocke, Jr.	Hertford,	T. G. Skinner.
Camden C. H.	G. G. Luke.	Hillsboro,	Graham & Graham.
Elizabeth City,	W. F. Martin.	Kenansville,	Wm. A. Allen & Son.
Enfield,	S. Whitaker.	Laurensburg,	G. M. Patterson.
Fayetteville,	J. C. MacRae.	Ridgeway,	M. J. Hawkins.
Gatesville,	M. L. Eure.	Tarboro,	Jno. L. Bridges & Son.

LIST OF ATTORNEYS.

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OHIO.

POST OFFICE.	NAME.	POST OFFICE.	NAME.
Bellefontaine.	Hon. Wm. Lawrence.	Dayton,	J. A. McMahon.
Bucyrus,	Thos. Beer.	Jefferson,	W. H. Ruggles.
Canton,	Louis Schæfer.	Kenton,	Jno. D. King.
Chillicothe,	Van Meter & Throck-	Lima,	Isaiah Pillars.
	morton.	Mt. Vernon,	W. Dunbar.
Cincinnati,	Rufus King.	Norwalk,	Chas. B. Stickney.
"	Moulton, Johnson &	Pomeroy,	J. P. Bradbury.
"	Blinn.	Ripley,	Young & Linn.
"	Logan & Randall.	Toledo,	A. H. McVey.
"	W. J. Applegate.	"	Osborne & Swayne.
"	Hon. Stanley Matthews.	"	G. R. Haynes.
"	Hoadley, Johnson &	"	C. H. Scribner.
"	Colston.	"	I. P. Pugsley.
"	Thos. T. Heath.	"	G. Harmon.
"	J. H. & C. Bates.	Troy,	W. S. Thomas.
Cleveland,	E. D. Starke.	Washington C.H.,	S. F. Kerr.
Columbus,	Jno. G. McGuffey.	Wellsville,	J. W. Reilly.

OREGON.

Astoria,	Silas B. Smith.	Portland,	S. W. Rice.
Baker City,	L. O. Sterns.		

PENNSYLVANIA.

Bellefonte,	McAlister & Beaver.	Philadelphia,	W. Henry Rawle.
Columbia,	J. J. Frueauff.	Pittsburg,	Kenneth Macintosh.
Clearfield,	Frank Fielding.	Reading,	H. Willis Bland.
Easton,	M. H. Jones.	Sunbury,	S. P. Wolverton.
Ebensburg,	Geo. M. Reade.	Troy,	D. Rockwell.
Harrisburg,	J. W. Simonton.	Washington,	Boyd Crumrine.
Meadville,	H. L. Richmond & Son.	West Chester,	R. J. Monaghan.

RHODE ISLAND.

Newport,	Hon. W. B. Lawrence.	Providence,	Hon. E. R. Potter.
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SOUTH CAROLINA.

Aiken,	G. W. Croft.	Charleston,	A. G. McGrath.
Anderson,	B. F. Whitner.	Cheraw,	Henry McIver.
Bamberg,	Izlar, Dibble & Dibble.	Columbia,	W. A. Clark.
Beaufort,	W. J. Verdier.	"	McMaster & Le Conte.
Bennettsville,	J. H. Hudson.	"	Melton, Chamberlain &
Charleston,	T. Moultrie Mordecai.		Wingate.
"	Simonton & Barker.	Conwayboro,	Jos. T. Walsh.
"	Buist & Buist.	Edgefield,	I. C. Sheppard.
"	Rutledge & Young.	"	Gen. M. C. Butler.
"	C. R. Miles.	Greenville,	James P. Moore.
"	G. W. Dingle.	"	Isaac M. Bryan.
"	McCrary & Son.	Newbury,	Jones, Jones & Mower.
"	Corbin & Stone.	Orangeburg,	Izlar and Dibble.
"	Walker & Bacot.	Sumpter,	Richardson & Son.
"	A. D. Cohen.	Union,	Robert W. Shand.
"	Simons & Simons.	"	P. A. Cummings.
"	W. H. Brawley.	Winnsboro,	Jas. H. Rion.
"	J. N. Nathans.	Yemassee,	C. J. C. Hutson.

TENNESSEE.

POST OFFICE.	NAME.	POST OFFICE.	NAME.
Athens,	J. S. Matthews.	Memphis,	J. W. Scales.
Altamont,	Jas. W. Bouldin.	"	Robt. Hutchinson.
Bolivar,	Frank Williams.	"	Hon. J. O. Pierce.
Brownsville,	E. J. & J. C. Reid.	"	Myers & Sneed.
"	W. F. Talley.	"	Humes & Poston.
"	H. B. Folk.	"	Estes & Ellet.
"	Ben. J. Lea.	"	Wright & Folkes.
Chattanooga,	Nash H. Burt.	"	Duncan & Gordon.
"	M. H. Clift.	"	J. A. Anderson.
"	Key & Richmond.	"	Wilson & Beard.
"	G. T. White.	"	Harris, McKisick & Turley.
Clarksville,	H. H. Lurton.	"	H. Clay King.
"	Jas. E. Bailey.	"	O. C. King.
Cleveland,	J. E. Raht.	Mossy Creek,	Wm. McFarland.
"	J. H. Gaut.	Morristown,	R. M. Barton.
"	P. B. Mayfield.	"	Palmer & Richardson.
Clinton,	Hon. D. K. Young.	Murfreesboro,	And. Allison.
Columbia,	Wright & Webster.	Nashville,	W. B. Bate.
Decaturville,	J. M. Porterfield.	"	Jere Baxter.
Dyersburg,	H. L. W. Turney.	"	Hon. W. F. Cooper.
Fayetteville,	J. H. Holman.	"	Robert Ewing.
Gallatin,	J. A. Trousdale.	"	Hon. Henry S. Foote.
"	M. S. Elkin.	"	Gaut, Osment & Gaut.
"	Head & Barr.	"	M. B. Howell.
"	J. J. Turner.	"	A. H. Lusk.
Greenville,	H. H. Ingersoll.	"	Thos. H. Malone.
"	Th. Maloney.	"	Jno. & Frank T. Reid.
Hartsville,	Jno. S. McMurray.	"	Baxter Smith.
Jackson,	E. S. Mallory.	"	Thos. M. Steger.
"	Jno. W. Buford.	"	Thruston & Bradford.
"	Jno. H. Freeman.	"	W. A. Dunlap.
Jonesboro,	I. E. Reeves.	Paris,	I. N. Thomason.
"	S. J. Kirkpatrick.	"	J. & W. H. McCallum.
Knoxville,	John Baxter.	Pulaski,	Jones & Ewing.
"	Geo. Washington.	"	Lynn & Oldham.
"	W. P. Washburn.	Ripley,	Wilkerson & Wilkerson.
"	Lewis Tillman, Jr.	"	Thos. H. Coldwell.
"	Logan & Lucky.	Shelbyville,	W. A. Milliken.
"	Thornburg & McGuffy.	Somerville,	W. B. Dortch.
Lebanon,	A. B. Martin.	"	W. A. Cooper.
"	J. & J. F. Stokes.	Trenton,	Carthel & Neil.
"	Hon. R. L. Caruthers.	"	Hon. Thos. J. Freeman.
Loudon,	H. A. Chambers.	"	J. G. Smith.
McMinnville,	Ben. J. Hill.	Troy,	S. M. Howard.
Memphis,	L. B. M'Farland.	"	Colyar & Curtis.
"	E. L. Belcher.	Winchester,	J. B. Fitzpatrick.
"	Hon. Henry G. Smith.	"	
"	W. M. Randolph.		

TEXAS.

POST OFFICE.	NAME.	POST OFFICE.	NAME.
Anderson,	J. G. McDonald.	Bandera City,	H. C. Duffy.
Austin,	Smith & Blackburn.	Bastrop,	J. D. Sayers.
"	Hancock, West & North.	Beaumont,	Tom. J. Russell.
"	Terrell & Walker.	Belton,	A. J. Harris.
"	E. T. Moore.	"	Tyler Rosebrough.

TEXAS—Continued.

POST OFFICE.	NAME.	POST OFFICE.	NAME.
Belleville,	Ben. T. Harris.	Houston,	C. Anson Jones.
Boston,	B. T. Estes.	"	Crosby & Hill.
Brenham,	P.H. & J. T. Swearingen.	"	Henry Clive.
"	Giddings & Morris.	"	J. W. Jones.
Bryan,	Jno. N. Henderson.	"	Likens & Stewart.
Caldwell,	A. W. McIver.	"	W. P. & E. P. Hamblin.
"	DeWitt C. Booth.	Huntsville,	Abercrombie & Goree.
Cameron,	C. R. Smith.	Indianola,	W. H. Crain.
Centreville,	W. D. Wood.	Jacksboro,	Thomas Ball.
"	W. M. Johnston.	Jasper,	Moulton & Doom.
Cleburne,	Oatis & Kouns.	"	L. Norvell.
Columbus,	W. J. Darden.	Jefferson,	Geo. T. Todd.
Comanche,	R. H. Hanna.	Kaufman,	Manion & Adams.
Corpus Christi,	Jno. S. Givens.	La Grange,	J. C. Stiehl
Crockett,	Nunn & Williams.	"	Tiechmuller, Dunn &
Dallas,	A. W. Nowlin.		Meerscheidt.
"	Jno. H. Carleton.	Lockhart,	Nix & Storey.
"	R. D. Coughanour.	"	M. R. Stringfellow.
"	Willard & Fletcher.	Marshall,	Jas. Turner.
El Paso,	Colbert Coldwell.	"	J. B. Williamson.
Fort Worth,	J. C. Terrell.	"	Geo. L. Hill.
"	B. B. Paddock.	Paris,	Maxey, Lightfoot & Gill.
Galveston,	Willie & Cleveland.	Rockport,	Wm. W. Dunlap.
"	Walter Gresham.	Refugio,	J. Richard Lynn.
"	Albert N. Mills.	San Antonio,	E. Edmonds.
"	George Mason.	"	Nic. Tengg.
"	Robt. G. Street.	San Marcos,	W. O. Hutchinson.
"	Jas. B. Gilmer.	Seguin,	W. E. Goodrich.
"	Ballinger & Jack.	Sherman,	Woods & Fears.
"	R. M. Franklin.	"	W. B. Brack.
"	T. N. Waul.	Springfield,	D. M. Prendergast.
"	Wheeler & Rhodes.	Stephenville,	S. C. Buck.
Gainesville	Weaver & Potter.	Tyler,	Stephen Reaves.
Gatesville,	W. O. Campbell.	"	Hon. M. H. Bonner.
Goliad,	Ellsberry R. Lane.	Victoria,	Lackey & Stayton.
Gonzales,	Harwood & Winston.	Waco,	West & Prather.
Greenville,	Winbray & Barlow.	"	R. J. Goode.
Hamilton,	Eidson & Pierson.	Waxahatchie,	E. P. Anderson & Bro.
Houston,	Baker & Botts.	Wharton,	George Quinan.

UTAH.

Beaver City,	Chas. J. Swift.	Salt Lake City,	Hempstead & Kirk-
Salt Lake City,	Hon. Frank Tilford.	"	patrick.
"	Ren. Sheeks.		Hoge & Jonasson.

VIRGINIA.

POST OFFICE.	NAME.	POST OFFICE.	NAME.
Alexandria,	John M. Johnson.	Fredericksburg,	Marye & Fitzhugh.
"	Geo. A. Mushback.	Harrisonburg,	Geo. G. Grattan.
Arrington,	Thompson & Brown.	Jerusalem,	J. H. & J. B. Prince.
Buchanan,	E. Pendleton.	Marion,	Jas. H. Gilmore.
Buckingham,	Wm. M. Cabell.	Portsmouth,	Godwin & Crocker.
"	Camm Patterson.	Richmond,	L. R. Page.
Charlottesville,	Wm. J. Robertson.	Scottsville,	Thos. S. Martin.
"	Blakey & Fry.	Suffolk,	Jno. R. Kilby & Son.
Estillville,	H. W. Holdway.	Tazewell C. H.	H. C. Alderson.
Fincastle,	Thos. D. Houston.	Winchester,	A. R. Pendleton.
Palmyra,	Wm. B. Pettit.		

WASHINGTON.

Walla Walla,

Thomas H. Brents.

WEST VIRGINIA.

Beverly,
Buchanan,
Charlestown,
Lewisburg,D. Goff.
W. G. L. Totten.
J. M. Mason.
Mathews & Mathews.Petersburg,
Point Pleasant,
Wheeling,
"W. F. Dyer.
W. H. Tomlinson.
W. V. Hoge.
Wm. P. Hubbard.

WISCONSIN.

Appleton,
Chippewa Falls,
Eau Claire,
Fond du Lac,
Hudson,
La Crosse,
"
Lancaster,
Madison,G. T. Thorn.
Bingham & Jenkins.
S. W. McCaslin.
W. H. Hurley.
Jno. C. Spooner.
Benj. F. Bryant.
J. W. Losey.
Bushnell & Clark.
Burr. W. Jones.Menominee,
Milwaukee,

"

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Oshkosh,
Sheboygan,Bundy & Manwaring.
Finches, Lynde & Miller.
Jenkins, Elliott & Wink-
ler.
Dixon, Hooker, Wegg
& Noyes.
Finch & Barber.
C. Krez.

